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Edited by RICHARD T. ELY, Ph.D., LL.D.
Professor of Economics in the University of Wisconsin.
Director, The Institute for Research in Land Economics and Public Utilities.

THE AMERICAN JUDGE

THE CITIZEN'S LIBRARY OF ECONOMICS, POLITICS AND SOCIOLOGY—New Series

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THE AMERICAN JUDGE. By ANDREW A. BRUCE, B.A., LL.B.

THE AMERICAN JUDGE

BY

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THE AMERICAN JUDGE

THE AMERICAN JUDGE

CHAPTER I

INTRODUCTION

No public official is more influential than the American judge; yet no official is more politically helpless. Paradoxical though it may seem, there is no one who is closer to, and at the same time further removed from, the mass of the American people. His duties are so arduous that he must of necessity be a student and a recluse. For fear that he may be charged with favoritism he must avoid even an appearance of undue intimacy with attorneys and with litigants. Even his right of friendship is limited; yet, and especially where the system of primary elections prevails, his position is preëminently political, and he is ever at the mercy of the politicians and of the powers behind the throne, whether those powers be popular, corporate, or democratic in the broader and higher sense of the term. In order to survive the ordeal of the primary elections, at which anyone can be a candidate, and at which every new aspirant may "gumshoe" for election, he should

himself be popular and have a large public acquaintance; yet, without losing his self-respect and without degrading his office, it is almost impossible for him to become popular.

The able and honest trial judge always has an impartial following among the jurymen who sit in his court, who share his duties, and who gradually come to respect him. It is true that the verdicts of these juries relieve him of much responsibility and popular criticism; yet even he must make bitter enemies. One side must be defeated in every lawsuit, and defeated and disgruntled litigants are seldom philosophers. They are vindictive; usually they are active at the polls; and in practical politics one active and vindictive enemy is more effective than many well-meaning but quiescent friends.

To use the language of Judge L. Dickson of Ohio: "An attack upon a judge is easy and always has a ready, eager, receptive and sympathetic audience. When a judge decides an issue, one side must lose. Fifty per cent of the litigants damn the judge, twenty-five per cent of the litigants, when they consider the cost and pay the fiddler, join the fifty per cent, and the other twenty-five per cent of the litigants always claim the case was won by them on its merits and forget the judge and dispute the lawyer's bill."

And especially helpless is the elective judge of an American appellate court. He is the subject of frequent criticism; yet he has no popular forum and no adequate means of defense. He is both of the world and out of the world. He depends for election upon the public support and the popular suffrage; yet his office is so surrounded by tradition and dignity, and so careful must he be not to express an opinion in advance on questions which later may come before him for judicial determination, that but rarely can he appear upon the public platform or defend himself or his decisions in the popular press. It is true that he has the law reports in which he may print his opinions; but these the general public never read. His position demands the highest wisdom. He should have the fullest opportunity for quiet thought and a complete freedom from petty annoyances; yet he has no opportunity for this thought and no freedom from these annoyances.

The days of John Marshall have passed away. In the last year of the great Chief Justice's services to the nation, the then seven justices of the Supreme Court of the United States were called upon to hand down but thirty-nine written opinions; nor did the writing and decision of these opinions involve the enormous labor of examining thousands which had gone before. Then, in-

deed, there were no thousands. Cases could be decided as they arose, at first sight, and in conformity with logic and expediency alone. Then there were none of the embarrassments of precedent. Then there were no serious difficulties arising from the doctrine of *stare decisis,* the fear of overruling former opinions, of being at variance with the decisions of other appellate tribunals, nor of overturning a complicated industrial and social system. Society and industry were then in the making. Statesmanship of a high order was required, but comparatively little laborious research.

To-day, the situation is entirely different. During the court year 1903-4, the nine justices of the same court filed 212 written opinions besides disposing of 190 cases without opinions.[1]

[1] Of this number 255 cases were argued orally, 93 were submitted on printed arguments and 4 were dismissed on the motion of the appellants themselves.

In *The Docket* published by the West Publishing Company, we find the following summary:

APPELLATE DOCKET—OCTOBER TERM

	1904	1905	1906	1907	1908	1909	1910	1911	1912	1913	1914
Cases at close of previous term not disposed of	282	280	305	343	421	478	586	640	671	604	535
Cases docketed at the term	400	488	476	471	487	503	509	531	509	524	528
Total	682	768	781	814	908	981	1095	1170	1180	1128	1063
Cases disposed of at the term	402	463	438	393	430	395	455	499	576	593	539
Cases remaining undisposed of ..	280	305	343	421	478	586	640	671	604	535	524

United States Circuit Courts of Appeals

Record for the Fiscal Year 1915*

Circuits	Number of Cases Pending Close of June 30, 1914			Number of Cases Docketed Fiscal Year 1915			Number of Cases Disposed of Fiscal Year 1915			Number of Cases Pending Close of June 30, 1915			Cases Marked Pending, Argued, and Awaiting Decision	Cases Marked Disposed of, Appealed to the Supreme Court of the United States	Percentage of Reversals to Total Number of Cases Heard and Determined
	Civil	Criminal	Total	Civil	Criminal	Total	Civil	Criminal	Total	Civil	Criminal	Total			
First ...	48	6	54	55	2	57	59	3	62	44	5	49	12	3	40
Second ..	117	2	119	293	27	320	321	24	345	89	5	94	11	12	31.5
Third ..	36	..	36	125	4	129	97	3	100	64	1	65	25	5	26
Fourth ..	53	5	58	85	7	92	79	10	89	59	2	61	42	7	30.3
Fifth ...	91	7	98	122	4	126	158	7	165	55	4	59	3	4	27.8
Sixth ...	158	6	164	138	4	142	158	3	161	138	7	145	16	3	35
Seventh .	84	8	92	124	18	142	105	5	110	103	21	124	54	3	27
Eighth ..	217	31	248	206	60	266	242	42	284	181	49	230	99	13	45
Ninth ...	86	6	92	160	18	178	150	16	166	96	8	104	66	9	18
Total	890	71	961	1,308	144	1,452	1,369	113	1,482	829	102	931	328	59	31

*From the report of the U. S. Attorney-General for the year ending June 30, 1915.

In 1908-9, 395, in 1912-13, 593, in 1913-14, 539, and in 1920-21, 608 cases were disposed of, and a large number of minor orders and rules were made and entered. Among these decisions were many which were of great importance and which went to the very root of government. We must also remember that before the opinion can be written, oral arguments must be heard, and often thousands of pages of printed and typewritten briefs and records must be read and studied.

What is true of the judges of the federal Supreme Court is equally true of those of the several states.[2] The burdens which are imposed are greater than can be borne. No matter how industrious and conscientious the average appellate judge may be, he, perforce, must give to his opinions less time and investigation and calm judgment than they deserve. Never can he do himself or the public full justice.

Yet, as a matter of last resort, we are governed by our judges and not by our legislatures;

[2] In 1911 the number of opinions in the highest courts of the states varied from 35 in Delaware to 1,788 in Texas; and in that year the supreme court of Illinois decided more than 1,000 cases. In the eight years previous to 1911, the Illinois court filed an average of 573 opinions a year. This increased output is to be found in nearly all of the states, even in those which are the most sparsely settled. In North Dakota, for instance, more opinions were written and filed during the seven years

and a supreme-court decision, besides determining the immediate case, lays down and creates the established law and prescribes the rule which

prior to December 31, 1919, than in all the previous years of the court's existence.

In *The Docket,* published by the West Publishing Company, we find the following summaries:

OUTPUT OF THE COURTS FOR 1914

Court	Opinions Per Year	No. of Judges	Average Opinions Per Judge
Alabama Sup.	606	7	87
Alabama App.	363	3	121
Arizona	86	3	29
Arkansas	563	5	113
California App.	441	9	49
California Sup.	312	7	45
Colorado Sup.	151	7	22
Connecticut	110	5	22
Delaware	86	7	12
Florida	199	5	40
Georgia App.	495	3	165
Georgia Sup.	595	6	99
Idaho	118	3	39
Illinois	432	7	62
Indiana App.	282	6	47
Indiana Sup.	199	5	40
Iowa	463	7	66
Kansas	493	7	70
Kentucky	913	8	114
Louisiana	398	5	80
Maine	172	8	22
Maryland	185	8	23
Massachusetts	488	7	70
Michigan	479	8	60
Minnesota	486	7	69
Mississippi	253	3	84
Missouri	1,180	20	59
Montana	121	3	40
Nebraska	402	7	57

shall govern under thousands of similar conditions. It is our judges who formulate our public policies and our basic law. All of our statutes must pass the ordeal of the constitutions, and it is the courts that apply the test. Even in the absence of a written constitution and under governmental systems such as prevail in France and in England, where the courts do not assume to

OUTPUT OF THE COURTS FOR 1914—(*Continued*)

Court	Opinions Per Year	No. of Judges	Average Opinions Per Judge
Nevada	69	3	23
New Hampshire	77	5	15
New Jersey	607	24	25
New Mexico	99	3	33
New York	224	10	22
North Carolina	438	5	88
North Dakota	153	5	31
Ohio	73	7	10
Oklahoma Sup.	741	11	67
Oklahoma Cr.	211	3	70
Oregon	439	7	63
Pennsylvania	502	7	72
Rhode Island	123	5	25
South Carolina	295	5	59
South Dakota	180	5	36
Tennessee	122	5	24
Texas	841	30	61
Utah	91	3	30
Vermont	94	5	19
Virginia	150	5	30
Washington	720	9	80
West Virginia	295	5	59
Wisconsin	409	7	58
Wyoming	32	3	11

enforce any basic charters and to set aside legislative acts as being inconsistent therewith, the legislative power of the judge is very great. The laws of the civilized world always have been and always will be judge-made rather than legislature-made. With the Hebrews the torah of the rabbis and of the prophets was all controlling. Even a Code Napoleon needs interpretation and enforcement and must be made responsive to daily life and to changing social needs. The courts are in continuous session; the legislatures can only meet at intervals. Either there must be no government and no legal growth, or the judges must be allowed to lay down rules of practice and of conduct in matters concerning which the legislatures have not spoken.

If these are the facts, then the American judge is of all public officials the most important, and of all public officials he should be the most respected and revered. His position should be well defined and understood, and he should be freed from all unnecessary distractions and burdens. Above all, his position should be reasonably secure and he should be allowed ample opportunity and leisure for the exercise of the great and important duties which devolve upon him. The reverse, however, is the case. Not only is

the average American judge overburdened with work, not only is he compelled to enter the political maelstrom, but of late years the judicial office itself has been much criticized and condemned. To-day in America the administration of the law is in popular disrepute and the courts are in popular disfavor.

We are in the midst of an era of a more or less unintelligent and iconoclastic criticism, but a criticism in which there is much of reason and of justice and which cannot be disregarded. Even the most conservative give evidence of a vague sense of dissatisfaction. They constantly protest against the law's delays and the cost of litigation.[3]

[3] This idea was expressed in the unrestrained remarks of the lawyer iconoclast of Chicago, Clarence Darrow, when in an address he said:

"Decisions are made and bound in sheepskin. We lawyers burrow in dust to find out what some fool judge said a thousand years ago . . . and then we have the law. . . . Take a poor man with a poor lawyer . . . a case argued with a giant on one side and a pygmy on the other, and the judge hearing the case whose associations have been with the rich. What show has the poor fellow got? Nobody is crooked or dishonest; it is just the natural course of evolution that has made the law of to-day. You can't get into court for nothing. Even if you could, you couldn't get along by yourself. You must have a lawyer. You can have any kind of a lawyer you can pay for. But you can't try your own case. You don't know how. The judge won't help you. He sits there to umpire the game and nothing else; it's all a lottery. If your case is just, that counts nothing. It depends upon a dozen things which make dice shaking a certainty compared with your game of chance. There is only one true thing about it,

They feel that the letter and the formalism of the law killeth; and they are prone to believe that, somehow or other, the lawyer, and especially the lawyer-judge, are responsible for that letter and for that formalism. Much of the criticism has been sane and helpful; much of it insane and injurious. All of it has tended to create a popular unrest. After a chief executive of the nation and a popular hero had openly stigmatized one federal judge as "an ass" and another as "a crook," what confidence in the judiciary could be expected of the great masses of the people?

We need to take our bearings. We need, in this era of readjustment and of a newer democracy, to determine more definitely the status and the function of the judiciary in our body politic. We should ask ourselves what we really expect of them. Our criticism has been destructive. It has torn down. It has not built up. We are in danger of losing our respect not only for the administration of the law, but for the law itself. What we now need is a criticism which shall be helpful and hopeful, and which shall be creative and constructive. We need to face

you always get a run for your money, as long as you have got any there is another court. There is no effort in the courts to get at abstract justice. It's merely a method that has been evolved through the ages for keeping society as it is."

the issues, and as far as possible to make the administration of the law responsive to our growing needs and to our evolving civilization. Before we can do this, however, we must understand. Above all we must not expect or strive for the impossible. "We are neither children nor gods, but men in a world of men." It is the purpose of this book to attempt to throw some light upon the problem, to present at least the issues, to explode perhaps some fallacies, and to discuss the limitations as well as the needs of a government of law among men.

CHAPTER II

ARE OUR COURTS OLIGARCHIC OR DEMOCRATIC?

It has often been charged that we have a judicial oligarchy, and that our judges legislate. These charges should be candidly admitted. At the same time it is conceded, and even made the ground for complaint, that the American judge realizes to the utmost his subservience to established law. Even his critics admit that, in trying to adapt the old law to new conditions and in making that law responsive to the needs of an evolving and changing social organism, he endeavors, as far as possible, to apply established principles and established rules, leaving the correction of his errors and the adoption of new principles, if the public desires them, to the legislatures and the constitutional conventions. This is nothing more than following precedents, and though the practice has often been condemned, it is this following of precedents and this subservience to established rules that has kept the

American judge from becoming a despot; and it is because of this, also, that the charges brought against it have not discredited the bench in America.

Where there is liberty there must be law, and where there is law there must be lawmakers. Even if the dream of the socialists were fulfilled and the reign of collectivism were to come among us, there would still be a need for the arbiter and the interpreter—in fact, for the lawyer-judge; for in the last analysis socialism is merely a system under which all human conduct is regulated by law. Socialism is in fact *all law,* as opposed to anarchism, which is *no law.*

Law always has been and always will be judge-made rather than legislature-made. In the history of the world the judge long antedated the legislative assembly. The father settled the disputes of his household and the chief those of his clan; the elder sat in the gates dispensing justice long before men dreamed of parliamentary government. These patriarchs and judges were often autocrats, but they rarely acted despotically. The decision in one case became the precedent and the law in another, and thus government by law originated among men. If the chief or father decided that Amos could do or could not do a

certain thing, he had to give the same decision when the case of Simon, showing similar circumstances, came before him—because of the fear of public opinion in the family or the clan, because of the logic of his own mind, and because of that inherent sense of justice which is the divinest and, at the same time, the commonest of human attributes. And since legislative enactments did not exist, he based his opinion and his judgment as to what Amos and Simon could do or could not do on the customs and the ideals of his people and thus crystallized these customs and ideals into law.

Even to-day the American judge must make the law in similar fashion, for if he refused to decide controversies merely because there were no legislative enactments upon the subjects, government and industry would come to a standstill and there would be no social progress. New conditions will ever arise and new judge-made law will always be needed. This is the manner in which the law grows and is developed.

Though individuals may be "standpatters" there can be no such thing as a virile standpat government or a virile standpat society. There must be growth or there will be decay. The Asiatic may prefer ever to do as his fathers did,

but never will the Anglo-Saxon be so restrained. The Chinaman may persist in tying one end of a rope to the rear of a wagon and the other end to the neck of a struggling horse, and in using the balking animal as a brake, but the American will insist on a more modern and more practical device. Each new invention, each new departure in industry, involves new rights and obligations and new law. The old law must ever be adapted to the new situation, and the legislatures never have kept and never will keep pace with the need.

Long before automobiles were considered of sufficient importance for legislative regulation, accidents occurred, gears became corroded by defective oils, and the rights and obligations in relation thereto had to be settled and determined. The stagecoach had been supplanted by the passenger train, and tens of thousands of accidents had occurred long before the legislatures awoke to a realization of the fact that the new device was intrinsically dangerous, and that the rights of the traveling public needed to be protected. In our large cities to-day perpendicular transportation almost equals in volume that in a horizontal direction; yet there is little legislation in regard to the passenger elevator. The aëroplane

is everywhere in evidence, but as yet only a few states have legislated upon the subject. In every industry and in every field of human endeavor controversies are arising for which there is no legislative solution, and the courts are being called upon either to adapt the old law to the new need or themselves to formulate new rules of conduct and of liability which shall safeguard the rights of all the parties, make a settlement in the courts possible, and avoid the primitive resort to the bludgeon and to the shotgun.

Even the freest and most democratic peoples of the earth always have been and always will be governed by their courts rather than by their legislatures. The courts are in continuous session; the legislatures meet only at intervals and for short periods of time. Parliamentary government is a very modern creation, and for many centuries the English parliaments were called, not for the purpose of basic legislation, but in order that taxes might be voted and the King's coffers be filled. Even to-day our legislative assemblies, when they do meet, are occupied in determining political rather than business and social matters, in caring for public institutions, in providing for methods of government and taxation and in voting supplies, rather than in the

creation of basic law or in the formulation and creation of personal and property rights.

Perhaps this is less unfortunate in view of the fact that our clamor for democracy and for popular control of our government has made us insist on short terms for our legislators, ignoring their need for training and knowledge. As a rule they are elected for but one session, which lasts only a few months; and during this brief term they have no time to familiarize themselves with the great body of law already in existence and which has been the result of centuries of growth and experience. They have neither time nor opportunity to study the real business and economic needs of the country and the rules of conduct which have usually prevailed. It takes a whole legislative session for a new member, no matter how gifted, to "get onto the ropes" and to learn the methods and routine of legislation. Often at the end of that time he is refused reëlection. In any case the primary elections are ever before him and there is always the temptation to do that which is popular and spectacular rather than that which is necessary. The sober paths of constructive legislation, which require study and experience, and which are not noticed by

the newspapers, can have no allurements for him.

Too often the legislator is a local rather than a public representative. His constituents judge him, not on his record as a lawmaker, but on his ability to secure local appropriations and to further local or class needs; and on these things his reëlection depends. Much evidence of this fact is found in the campaign utterances of our public officials. The writer has before him a preëlection document which was issued by a United States senator after eighteen years of service at the national capital. That period must have been full of opportunities, and during it matters of great national and international import must have been considered. Yet the senator said nothing of real service, nothing of constructive legislation, but asked for reëlection because he had succeeded in securing appropriations for various post offices and federal buildings and had consummated the wonderful achievement of having a battleship named for the state he represented.

These limitations of our legislators are found also in our executives. Usually our governors are elected for only two years. They come before their first legislatures as novices, and must perforce spend the first year in familiarizing

themselves with their duties and in distributing patronage. Many of them spend a large part of the second year in traveling through their respective states and in seeking reëlection. If reëlected, they are tempted to devote much time during the second term to plans for election to the United States Senate or to the Presidency. What time have they in which to study the basic law and the real social and economic needs of their respective communities?

The result of all this is either that there must be no progress and no legal growth, or that the courts must determine the rules of conduct which shall generally prevail in social and business affairs, and, by the process of determining individual cases, formulate the general and universal law. They must be the real lawmakers. This has always been and will always be the case. Practically all of the law of master and servant, of negligence and contributory negligence, of common carriers,[1] and practically all our commercial law has been made by the judges and not by the legislatures. It is true that we have legisla-

[1] Of recent years, of course, we have witnessed many employers' liability and employees' insurance acts. All of these acts, however, are based upon the judge-made law, are limited in their scope, and are corrective and supplementary rather than fundamental.

tive codes covering negotiable instruments and similar matters, but these acts are merely a compilation of judge-made laws which had existed and had been in force for centuries.

In order to be of any value, laws passed by the legislature must be enforced; and before they can be enforced they must be construed. Never shall we be able to take the power and duty of construction from the courts, and, necessarily, the power of him who construes must be very great. Often the statutes are inconsistent within themselves and are absurdly ambiguous. At the best, human language is so incomplete a vehicle of thought that perfect clarity is rarely attainable, and often the legislative intention is hard to determine. Often the act was ambiguous even to its makers, and was voted upon and passed under varying interpretations. Sometimes the legislature had no clear intention in passing the law. Recently the supreme court of North Dakota was called upon to decide whether a certain act which changed the method of court procedure was intended to cover criminal as well as civil cases, and during the investigation the lawyers on both sides wrote to the author of the bill and to the judiciary committee which approved it to ascertain what had been the intention. All of these

gentlemen replied that they did not know. Yet the question was clearly at issue, and the court had to decide it.

In America all laws are required to pass the ordeal of the constitutions, and it is the courts that apply the test. Even in countries like France and England, where the judges are not expected to invalidate statutes on constitutional grounds, the courts have the ultimate power of interpretation and enforcement, and that power is all-controlling. Though the English judges disclaim the power to declare statutes to be unconstitutional, they none the less apply "the rule of reason," and, in construing and enforcing legislative enactments, rigorously adopt the presumption that it never could have been intended that any act should be so construed as to violate basic rights and the established principles of British law.

Even as early as the reign of Henry VIII we find evidence of a contest between the parliament and the courts, and in the concluding paragraph of a statute we read:

"And be it finally enacted that the present act and every clause, article and sentence comprised in the same, shall be taken and accepted according to the plain words and sentences therein contained, and shall not be interpreted nor ex-

pounded by color of any pretense or cause or by any subtle argument or invention of reason to the hindrance, disturbance or derogation of this act or any part thereof."

This responsibility for interpretation which rests upon the courts brings criticism upon them however they may interpret a law. Sometimes the objector protests against a liberal construction and what he terms "judicial legislation." Just as frequently he complains that "the letter of the law killeth," and that a narrow judicial construction has thwarted the real intent of the enactment. It is true that some English and American judges have purposely disregarded the plain intention of the legislative acts. Lord Coke was, perhaps, among the worst offenders in this respect, and it may be that we have derived from him our American doctrine that there are inherent rights to liberty and to property which no legislature can take away, and which the courts must protect.

But, whether there be a paramount law and a paramount necessity or not, it is certainly true that someone must construe, and that, even with the best motives, the legislative will may often be unwittingly disregarded. The judge is, after all, only a human being, with preconceived and

inherited ideas and impressions, and it is unavoidable that his own personal opinions and conceptions of public policy should be more or less reflected in his interpretations. Someone, however, must interpret, and if the courts have at times exceeded their authority in passing upon the validity of statutes, have occasionally legislated without need, and have sometimes placed a forced construction upon statutes and contracts and on the law generally, it is doubtful if any lasting harm has come from this unauthorized activity.

It is a mistake to assume that our judges are undemocratic. Even the Supreme Court of the United States, with its life membership, its enormous burden of work, and its necessary isolation, ultimately reflects the thought of the nation on social and political matters. In the history of English law the judge-made law has, on the whole, been much more democratic and humane than that which has been made by Parliament. We criticize the safeguards which the judge-made criminal law affords to the defendant, but we should remember that they were merely the offset to a brutal and sanguinary penal code. When, indeed, a class parliament made one hundred and sixty offenses capital, and made the stealing of a sheep, the shooting of a hare, and

the begging of an old soldier on the streets punishable by death, the more humane judge sought to give the accused fair play and every opportunity for defense and to prevent, if possible, the execution of the innocent.

So deeply was this class feeling and lack of humanity and democracy implanted in the British squirearchy, that the battle for reform extended well into the last century, and, as a matter of fact, is even now far from won. After a lifetime of effort, all that so great a reformer and advocate as Sir Samuel Romilly was able to point to in the way of actual and tangible results was the repeal of two of the statutes of the reign of Elizabeth, one in 1808 and the other in 1812. One of these had made pickpocketing a capital offense; the other had made the begging of an old soldier or sailor on the public streets punishable by death.

Even to-day in America, after centuries of Christian culture, and in spite of our primary elections, our initiative and referendum, our much-vaunted return to a pure democracy and to a rule by the plain people, our criminal codes are full of flagrant injustice and of class interest, and brutally disregard human lives and human souls. Yet these codes are entirely legislature-made, and the courts are more severely criticized for at-

tempting to soften their severities than for their attempts to mollify any other branch of the law.

Criminal punishments, indeed, are not measured out on the basis of culpability, but on the basis of the injury suffered, in spite of the fact that we also allow civil actions against the criminal for the recovery of damages. The banker desires to have his business protected and the passing of worthless checks and forgery and embezzlement prevented, so he comes to the legislature for help, and the legislature does as he asks and ties the hands of the trial judge by fixing a minimum penalty below which he cannot go, even in cases wherein the excuse or the temptation was great and mollifying and extenuating circumstances existed. The farmer wants his horses protected, and the automobile owner his car, so often horse and automobile stealing are punished more severely than are seduction, adultery, or even rape.

The offenses of grand larceny and of forgery serve well to illustrate the tendency and the fact. If, in North Dakota and in the majority of states, a man or boy steals twenty dollars with the basest of motives, he is punished by a fine, fixed by the legislature, of not less than ten dollars nor more than one hundred dollars, or by imprisonment in

the county jail not to exceed thirty days, or by both fine and imprisonment. If, however, he steals twenty dollars and one cent in order that he or his family may be saved from starvation, the punishment is not less than one year nor more than five years in the penitentiary. Let the man or boy steal less than ten dollars, and he can be punished only by a fine of from ten to one hundred dollars or by imprisonment in the county jail for thirty days. Let him, however, encroach on the rights of the banker or the merchant and forge a check for only one dollar, and his punishment is fixed at not less than one year nor more than ten years in the state penitentiary. Or let him obtain goods to any amount, however trivial, by false pretenses, and the punishment is not less than one year nor more than three years.

These are mere examples. The same disparity in sentences and the same examples of class legislation are everywhere to be found in our criminal codes. Not only, indeed, is our criminal law largely the law of an eye for an eye and a tooth for a tooth, but it is a class-made law, and, as in the days of old, it is only the vulgar offenses and those that the ignorant and the poor usually commit, that are severely punished. Little attention is paid to real culpability and to the measure of

real moral turpitude. We punish the act rather than the guilt or the moral obliquity.

So too in the petty offenses; things work out easily for the lawbreaker who is a man of means, and the code we enact is in effect strictly a class code. For all the minor offenses, and often for the larger—for those, in short, which you and I are liable to commit—we impose fines, and, as an alternative for paying the fines, we provide a term of imprisonment. A well-to-do man becomes intoxicated and creates a disturbance on the public streets. He is fined fifty dollars, which he pays without suffering inconvenience, and his name is usually kept from the newspapers. A poor man who commits the same offense is fined the same amount, but, as he is unable to pay it, he goes to jail and his wife and family starve.[2]

[2] In 1918 the United States Census Report on Prisoners and Juvenile Delinquents was given to the public, and although this report was much belated and was based on the figures and investigation of the year 1910, it contained much valuable information and fully vindicated the movement which is now being made everywhere for the increase of the power of trial judges to suspend and modify sentences.

In speaking of this report, Miss Edith Abbot, on September 3, 1919, in an address before the American Institute of Criminal Law and Criminology, said:

"The recently published United States Census Report on Prisoners and Juvenile Delinquents contains important data with regard to the need for adult probation in the United

In the face of this kind of legislature-made law, which is to be found on the statute books of all

States. This report shows that several thousand persons each year experience the demoralization of a short sentence in one of our minor prisons and that nearly three hundred thousand persons are committed annually for the non-payment of fines.

"This Census Report presents, for the first time in this country, statistics showing the total number of persons imprisoned in a given year for the non-payment of fines. The report shows that 58 per cent of all the persons committed to prison in our country are committed not for their crimes, but for their poverty, because they were too poor to pay the fines imposed by our courts. The extent of this modern system of imprisonment for debt is shown by the following figures: In a single year, 291,213 poor persons were imprisoned for non-payment of fines, and among them were more than 6,000 children of juvenile court age (seventeen or under). For inability to pay fines of less than $5, 35,363 persons were imprisoned and 129,713 for fines of less than $10.

"Imprisonment for non-payment varies in different sections of the country and is, of course, more common in the South than in the North. Sixty-eight per cent of all prisoners in the South Atlantic States are committed only for inability to pay fines, and the percentage falls to 48 per cent in the Middle Atlantic States and to 43 per cent in New England.

"To members of this Institute, to those who know the noisome, verminous, dark, ill-ventilated local prisons to which these persons are sent to spend their time in idleness and demoralizing companionship, the cruelty and waste of such punishment is obvious.

"These facts as to the extent of imprisonment for the non-payment of fines should be the more carefully considered in our country in view of the fact that the whole system has been practically swept away in Great Britain by the successful operation of the Criminal Justice Administration Act of 1914. In democratic America it appears that in the second largest city in the country the judges are still sending annually to the city workhouse from ten to twelve thousand persons who are too poor to pay their fines, and in the country as a whole, more than 290,000 persons suffer this imprisonment for poverty in a single year; while Great Britain has adopted the more efficient and humane policy of doing away with the last surviving remnant of the medieval system of imprisonment for debt. Since 1905, it had been optional with the British courts to give a man time to pay his fine, but in 1914 it ceased to be optional

the states, it is absurd to claim that the courts alone are hard-hearted and undemocratic and that

and became mandatory. The first section of the Criminal Justice Administration Act of 1914 provides that in all cases time must be given for the payment of fines and the time must be not less than seven clear days. At the end of this time further time may be allowed by the court and payment in installments may be allowed. The Act contains the further humane provision that in imposing a fine the court is to take into consideration 'the means of the offender so far as they appear or are known to the court.' This provision puts an end to what the Prison Commissioners for Scotland called the 'abuse which . . . arises from the imposition for certain offenses of fines upon a stereotyped scale, which necessarily press much more hardly upon the very poor than upon those who are better off.' Reports of the three Prison Commissioners of England, Scotland, and Ireland all testify to the beneficial results of the Act of 1914 in operation. The experiment appears to have been entirely successful during the five years that have elapsed since the Act became effective.

"A twin evil that has recently been abolished in Great Britain is the short sentence. The Criminal Justice Administration Act of 1914 contains two provisions designed to do away with short and useless sentences of imprisonment: (1) The courts are given power to substitute for a sentence of imprisonment, an order that the offender be detained for one day within the precincts of the court. (2) If a sentence of imprisonment does not exceed four days, the offender is not to be sent to jail, but is to be detained in a 'suitable place' certified as such by the Home Secretary. The Commissioners of Prisons for England and Wales emphasize in their 1915 report the importance of the Act of 1914 in preventing the development of a criminal class. As to the short sentence they say that it has not a 'single redeeming feature.' 'It carries with it all the social stigma and industrial penalties of imprisonment with no commensurate gain to the offender or the community. If there still survives in the minds of administrators of justice the obsolete and exploded theory that prison is essentially a place for punishment—and for punishment alone—for the expiation of offenses in dehumanizing, senseless tasks, and arbitrary discipline, truly there could be devised no more diabolical form of punishment than the short sentence often repeated.'

"In America, the short sentence, like imprisonment for fines, is still with us. The recently published Census Report shows that 24,970 persons were given sentences of less than ten days

the people enthroned are humane, unselfish, and democratic.

It is well, too, to remember that practically all of the redress for personal injuries which the employee now has was given to him by our judges. The rules of law which make the master liable in damages for injuries to his servants through negligence, and which make it his duty to supply those servants with reasonably safe tools and ap-

in our county jails alone. In the municipal jails, it appears that 4,513 persons were sentenced to terms of imprisonment of four days or less than four days. It may be asked what the Committee on Probation has to do with the problem of short sentence or with imprisonment for the non-payment of fines. The answer is, of course, everything, for probation is the accepted American substitute for these evils."

Recently in the State of Florida a boy was flogged to death by the brutal overseer of a lumbering camp to which he had been sold or hired by the state for the purpose of working out a fine of twenty-five dollars. His only offense was that of riding upon a railway train without paying his fare. Flogging as a judge-imposed punishment for crime we suppose had been abolished by the state legislature, but it was still authorized as a means of prison discipline and was allowed to be resorted to by the employers in the lumber camps. It is true that the statute only authorized *ten stripes* on *any one occasion* and that the whipping boss evidently exceeded his authority. It is hard to believe, however, that any judge would have deliberately sentenced a mere boy to ten stripes with a rawhide for stealing a ride upon a railway train, and it is difficult to understand how in a Christian and more or less humane age any legislature could have authorized bondage in such a camp merely because of the poverty of the prisoner and entrusted the employers with such brutal, arbitrary and unsupervised powers of discipline.

pliances and sanitary premises with which and in which to work, and to warn him of sudden and unexpected dangers, originated in the courts and not in the legislatures.

As a people we have been individualistic, and it is not a matter of surprise that at times our judges have reflected this fact. We have clung persistently to a belief in, and to the ideal of, the existence of an actual equality of contractual ability and opportunity in the industrial world. We have therefore come but slowly to see the necessity for legislative interference. The labor laws which the courts have held invalid have often been logrolled and have usually been passed before their time, in that they have had no real public sentiment behind them. Often the legislative leaders have allowed them to pass and to be placed on the statute books only because they were morally certain that the courts would yield to the dominant public sentiment and hold them invalid, while they, by supporting them, could gain votes for other measures in which they were personally interested. The American judges are constantly being made the cat's-paw of the politicians. They are constantly being blamed for a lack of sympathy and democracy and for overruling the judgment of the legislatures, when they

are merely reflecting the popular conscience and the popular will, and are doing the very things which the legislatures expected them to do. We must remember also that the laws against labor unions and the strike and the boycott were in their inception legislature-made and not judge-made.[3]

It is only recently, indeed, that the world's parliamentary and legislature-made law has been in any sense of the word democratic. It falls far short of that ideal even to-day. In the past the members of these bodies have come almost exclusively from the aristocratic classes. Even to-day the legislator is too often a representative merely. He belongs to a class; he is a partisan; he is sent to the legislature to represent a locality or an interest or an industry and to bring about results, and is a special pleader and an advocate. Often his main duty is to secure appropriations. If he fails in these respects, he will make powerful and bitter enemies and will lose many votes. The legislator who seeks really to reform the law and to bring about an era of impartial justice, has but few active supporters. He comes back to his constituents with little vote-securing ammunition. His supporters are not of the militant kind, and are not immediately in-

[3] All were based on the Statute of Laborers.

terested in politics. There is no money in law reform for them, and they are neither vindictive nor aggressive.

The tradition of the bench, on the other hand, is impartial justice. The appellate courts are courts of equity as well as of law. The real judge comes to look upon himself as the trustee of all. His very position brings with it an ethical stimulus. The British chancellor is known as the "keeper of the king's conscience." It is seldom that a judge fails to be broadened and humanized by these ideals. The courts, indeed, have reflected the dominant ethics and sentiments of the majorities, while the individual legislator has generally thought only of his own constituents or, perhaps, of his immediate and personal interests. If the test of democracy is the carrying out of the will of the majority, it is difficult to see how any government could be made more democratic than has been the government by the courts.

Even on the much-mooted questions of the strike and the boycott, the control of trade and labor combinations, and conspiracies in restraint of trade, the judges have but reflected the public attitude of mind and the public thought. They have wavered and have been inconsistent because the public itself has wavered and has been inconsistent. As a people we have never quite made

up our minds whether we really desire to check the right of combination and of entering into contracts and agreements which shall regulate prices. We have not been quite sure that competition may not be carried too far, and that there is not, after all, an economic saving in combination. We have inveighed against the giant monopolies which are far from us, or whose owners and proprietors are not our next-door neighbors; yet in every small town there are combinations among our business-men, which, though technically unlawful, are allowed to exist without criticism. Everywhere trade meetings and conventions are being held and, in many cases, are being addressed by lawyers who are expected to tell their members, not how to serve the public or how to bring about an equal enforcement of the law, but how far they may organize and regulate prices and violate the spirit, without actually coming within the penalties, of the numerous anti-trust laws which the legislatures have passed, though often without the intention of enforcing them uniformly. The "gentleman's agreement" and codes of professional courtesy are taking the place of the strict formal agreement and the old common-law conspiracy.

Labor has inveighed against the combination of capital and the employers' trust. Yet on its own

part it has strenuously insisted on the right to organize and to form a labor trust. It has also insisted that, in all the anti-trust and anti-combination statutes, exceptions shall be made in its favor, and it has bitterly denounced the construction by the courts which has made the anti-pooling and anti-combination clauses of the Sherman Act apply to the combinations of laboring men as well as to those of capitalists. The farmers, too, have always insisted that the producers of farm products should be exempted from the provisions of these laws. In the state of Kentucky the tobacco-raisers have inveighed against and fought against a manufacturer's trust. They have, however, and at the same time, fought for and organized a producers' trust, which they have induced their legislature to legalize. In the wheat and cotton industries enormous farmers' trusts and pools have been advocated, which shall be bolstered and protected from outside competition by a tariff wall and shall be financed by federal loans.[4] We cannot expect our courts always to go ahead of the popular mind and the popular conscience on these great social and political questions.

[4] The Lever Act and the Clayton Act exempted farm producers and laborers from the provisions of the Combination Acts.

CHAPTER III

THE COURTS, THE CONSTITUTIONS AND THE REGULATION OF INDUSTRY

THE charge is frequently made that our appellate courts have improperly assumed and have improperly used the power to set aside, or rather to refuse to enforce, statutes which in their opinion are in violation of the state and national constitutions; and that to this extent they have been usurpers of authority. However, though the power may at times have been improperly used, we believe there is no justification for the claim of an arbitrary assumption.

Generally speaking, the courts have not attempted to set statutes aside. They have refused to enforce them. They have merely adhered to their oaths of office to support the constitutions, and have held that these oaths have precluded them from rendering judgments and decrees which are in violation of the state and national

charters which they have sworn to obey. If, indeed, the members of the state and national legislatures were as faithful to their own oaths, there would be little call for judicial interference.

Not only has this power of the courts been acquiesced in for so long that the authority can now hardly be disputed, but there is every reason to believe that it was rightfully assumed in the first instance. The Constitution of the United States created a supreme tribunal with the power to construe and to pass upon and to enforce the acts of Congress. It created a central government and guaranteed to the states and to individuals certain basic rights. It imposed limitations both upon Congress and upon the several states. This constitution was not the work of a moment or the result of the thought of a moment. Behind it were the thinkers of the ages, the experience and the customs of the English race, and above all the experience and the customs of the American colonists. The laws of the colonies were always subject to review; they had, at least, to conform to the charters. Always there was a more or less absolute veto power in the Privy Council. Cases are not lacking in which even the colonial courts had not hesitated to refuse enforcement, not only to the acts of their own leg-

islatures, but to those of the King in Council and of the English Parliament.[1] It was not incon-

[1] In 1639, in the case of Forst *v.* Leighton (see *American Historical Review,* Vol. 2, p. 229), the Supreme Court of Judication of Massachusetts refused to enforce an order of the King in Council "because the powers of the court derived through the charter and the laws passed to carry the same into effect were in the judgment of the court inadequate for that purpose."

In the case of Campbell *v.* Hall, Cowper 204, Thayer's "Cases on Constitutional Law," Vol. 1, pp. 40-47, in the English Court of Kings Bench, we find the following:

"We therefore think, that by the two proclamations and the commission to Governor Melville, the King had immediately and irrecoverably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of Grenada, or more generally to whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council, in like manner as the other islands belonging to the King.

"Therefore, though the abolishing the duties of the French King and the substituting this tax in its stead, which according to the finding in this special verdict is paid in all the British Leeward Islands, is just and equitable with respect to Grenada itself, and the other British Leeward Islands, yet, through the inattention of the king's servants, in inverting the order in which the instruments should have passed, and been notoriously published, the last act is contradictory to, and a violation of the first, and is, therefore, void. How proper soever it may be in respect to the object of the letters-patent of the 20th July 1764, to use the words of Sir Philip Yorke and Sir Clement Wearge, 'it can only now be done, by the assembly of the island, or by an Act of the Parliament of Great Britain.'"

"In the *Hutchinson Papers* (Vol. 11, p. 1), there is preserved a very interesting account of a case before Symonds, a magistrate. To judge from his letters, Symonds was a careful student and great admirer of the English common law. The case under consideration, Giddings *v.* Brown, brought up some interesting questions as to the nature of law and the power of the courts. A dwelling had been voted by a town to its minister; the plaintiff had resisted the collection of the tax that

sistent, it was, in fact, a perfect analogy, to vest the same veto power in the Supreme Court of the

had been levied to pay for this dwelling, and his goods were accordingly distrained. Symonds, in giving judgment for the plaintiff, says that the fundamental law which God and nature has given to the people cannot be infringed. The right of property is such a fundamental right. In this case the goods of one man were given to another without the former's consent. This resolve of the town being against the fundamental law is therefore void, and the taking was not justifiable. Symonds refers with respect to the English law and quotes Finch and Dalton. He uses it, however, merely for illustration, and says 'let us not despise the rules of the learned in the laws of England who have every experience.' The precedents on which he relies are colonial and their binding force is recognized. The substance of the judgment is that property cannot be taken by public vote for private use. The opinion is interesting as an expression of natural law philosophy, and it is, perhaps, the earliest American instance where the power is claimed for the courts to control legislative action when opposed to fundamental law. The case, moreover, shows very clearly in what light the common law was regarded by the New England colonists; not at all binding *per se,* but in as far as expressive of the law of God to be used for purposes of illustration and guidance." Paul Reinsch, in "The Colonial Common Law," *Select Essays in Anglo-American Legal History,* 367, 376.

In the case of Commonwealth *v.* Caton, 4 Call. 5, which was decided by the Court of Appeals of Virginia in 1782, an act of the legislature was held invalid which deprived the governor of the pardoning power which had been especially entrusted to him by the state constitution.

"By a slow and almost imperceptible development the American doctrine of judicial supremacy had emerged through a long line of colonial and state precedents into a well-defined principle of judicial practice. Referring on some occasions to an overruling law of nature, on other occasions to the fundamental principles embodied in the great English charters of liberties, and finally, to formally enacted written instruments, colonial and state courts steadily asserted and maintained the right to invalidate acts, and thus they promulgated for the United States and put into an effective form Coke's theory of the supremacy of the courts. In practically every case where

United States, and to impose upon it the duty of seeing that the decrees of the basic national char-

there was resistance to judicial decrees invalidating legislative acts the court's opinion and judgment were ultimately accepted and vindicated. Inpeachment proceedings and legislative censure only tended to strengthen judicial power. Finally, the fact that the other departments of government deferred to the judgment of the courts and accepted their conclusions, although there was no legal requirement that they should do so, tends to show that it was the acceptance of certain fundamental notions of law and government which led men to sanction and support the underlying principles of the American doctrine.

"The way was prepared for the general adoption of the practice of judicial control of legislative acts before the federal courts were factors to be reckoned with in the law of the United States. It was inevitable that the federal judiciary should follow the plan which had so generally been incorporated into the practice of the states. The acceptance of the doctrine by the national judiciary gave added prestige to those who were hastening the day of its adoption through the states, and made it certain that the principles involved would soon be generally approved as a primary and indispensable feature of the entire system of government in the United States."—Charles Grove Haines, "The American Doctrine of Judicial Supremacy," p. 120. (The Macmillan Co., 1914.)

Although on several occasions and noticeably in an address delivered before the Law Department of the University of Pennsylvania on the 27th of April, 1906, Chief Justice Walter Clark of the supreme court of North Carolina has made the positive statement that "A proposition was made in the Convention—as we now know from Madison's Journal—that the judges should pass upon the constitutionality of acts of Congress. This was defeated 5 June, receiving the vote of only two states. It was renewed no less than three times, i.e., on 6 June, 21 July, and finally again for the fourth time on 15 August," there is absolutely no historical basis or warrant for the assertion. What was proposed and voted upon was merely a resolution or amendment which sought to create a council of revision, which should function during the process of legislation and should exercise a veto rather than a judicial

ter, the Constitution of the United States, were properly observed.

Between the state governments with their rightful jealousy of their reserved powers, and the federal government with the innate tendency to enlarge its power, some arbiter was imperatively necessary. Under the Constitution the prohibi-

power. One of these resolutions was introduced by Randolph on the 29th of May, 1787, and was as follows:

"That the Executive and a convenient number of the national judiciary ought to compose a council of revision, with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by the members of each branch." —Madison's Journal, 62, Scott's Edition.

The other resolution was introduced on August 15, 1787, by Madison and was as follows:

"Every bill which shall have passed the two Houses shall, before it become a law, be severally presented to the President of the United States and to the judges of the Supreme Court for the revision of each. If upon which revision, they shall approve of it, they shall respectively signify their approbation by signing it; but if upon such revision, it shall appear improper to either, or both, to be passed into a law, it shall be returned, with the objections against it, to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider the bill: but if, after such reconsideration, two-thirds of that House, when either the President, or a majority of the judges shall object, or three-fourths, where both shall object, shall agree to pass it, it shall, together with the objections, be sent to the other House; by which it shall likewise be reconsidered, and, if approved by two-thirds, or three-fourths of the other House, as the case may be, it shall become a law."—*Madison's Journal,* 532, 533, Scott's Edition.

tions upon the states were, in substance, prohibitions upon the state legislatures, and the powers granted or forbidden to the Federal government, were, in reality, granted or forbidden to Congress. To have given Congress power to determine a controversy between a state lawmaking body and itself, as to which should legislate concerning a particular subject, would have made Congress a judge in its own cause and would have given the death blow to dual sovereignty.

It is true that that Magna Charta and the British charters and bills of right which followed placed limitations upon the power of the crown only, but the American colonists had grievances against the English Parliament as well as the English King and the states and the people generally were not willing to trust to the unlimited discretion of the new national legislature which they were creating. Not only had the British Parliament passed the Navigation Acts but for hundreds of years after Magna Charta it had condemned men without trial, sent them to the block, forfeited their goods, punished the guilty and innocent alike. They had had their experience with legislative tyranny. Designedly, we believe, they decreed that the American Constitution should protect the individual citizen and the in-

dividual state against the aggression not only of the executive but of the legislature. There can be no doubt that the power of the judiciary to declare a law invalid if it transcends the powers given by the Constitution, is one of the strongest barriers ever devised against the tyrannies of political assemblies and that this feature of the Constitution was not only rightfully interpreted by Chief Justice Marshall but is America's great contribution to the democracy of the world. It remains to-day the cornerstone of American liberty.[2]

In the first ten amendments to the Federal Constitution are contained guarantees of the fundamental rights for which Englishmen had been struggling through the centuries, and the denial of which to the American colonists had been the real cause of the American Revolution. These amendments have been aptly termed the American Bill of Rights, and it was only when a promise was given that they should be added to the Fed-

[2] This was certainly the opinion of De Tocqueville, who had a vivid knowledge of the excesses of the French legislative assemblies. See generally Address of Douglas W. Brown, President of West Virginia Bar Association, delivered November 16, 1922. Also "Decisive Battles of Constitutional Law" by Dumont F. Smith, *American Bar Association Journal,* Vol. 9, p. 109.

eral Constitution that the states of Maryland and Virginia consented to join the union. It was, in short, because the government of George III had sought to violate these basic and fundamental rights which Englishmen everywhere deemed to be superior to any act of parliament or any king in council that the flame of war burst forth. Among them were religious freedom and the freedom from test oaths, freedom from unlawful searches and seizures, the right to a trial by jury, and the freedom of property from arbitrary confiscation.

There had been carried into America the old conflicts between Lord Coke and James I, and the Lord Chief Justice Pratt and George III, in which the great English judges had fearlessly asserted the supremacy of the courts and the doctrine that there were certain fundamental rights which no king or parliament could take away, and to the deprivation of which no court would lend its aid or its sanction. The fourth amendment to the Federal Constitution which guarantees to the people of the United States security in their persons, houses, papers, and effects against unreasonable searches and seizures, and which has been reënacted into the constitutions of all of the American states, is but a recognition of the

English doctrine of personal privacy which was recognized among the Romans, which was guaranteed in Magna Charta (though as an aristocratic privilege), and which was later democratically expressed in the magnificent statement that "a man's house may be a hovel; its roof may be of thatch; the walls may be broken; the snow may enter; the rain may enter, but the King of England, with all of his forces, cannot enter."

It would be absurd to contend that when the federal, and later the state judges, were required to lift up their right hands and swear to support the constitutions, they were expected afterwards to perjure themselves and to sit idly by and allow these fundamental guarantees to be violated. If indeed the time ever comes when a judge will say: "I am called upon to express my opinion upon this statute; I know that it is unconstitutional; I know, however, that at the present moment it meets with popular favor and that the primary election is near, and therefore I will declare it to be constitutional," then, and at that moment, free government will vanish from America.

Whatever may be the rights and the powers of the Supreme Court of the United States, there can certainly be no justification for any claim of usurpation on the part of the supreme courts of

the several states. Prior to the adoption of the Federal Constitution the courts of Virginia, Rhode Island, New York, New Jersey and North Carolina had exercised the power. Practically all of the state constitutions have been adopted or have been radically amended during the last fifty years. None of them deny to the courts the power to invalidate statutes on constitutional grounds; and it is quite clear in every instance that the right had been exercised and acquiesced in for many years prior to the adoption and to the amendments. In all of the constitutions the judges are required to swear to support the constitutions of the United States and of their local sovereignties. Many of the state constitutions expressly recognize the right, by providing that the invalidity of one clause or section of an act shall not affect the remainder, provided that the intention of the legislature is clear, and, when shorn of its defective part, that remainder will be intelligible and enforceable.[3]

In almost every socialist and radical parade a banner is displayed which bears the inscription:

[3] In North Dakota and Oregon the power has been clearly conceded by the adoption of a constitutional amendment to the effect that no act shall be held to be unconstitutional unless decided to be so by at least four out of the five members of the supreme court.

"We insist upon our constitutional rights." Why, we ask, insist upon these rights if no court is able to enforce them? It is, indeed, a noticeable fact that no state has limited the power of the courts by a constitutional amendment, though this might easily have been done if the people had only so desired, nor has the Federal Constitution ever been so amended. Though at an early time impeachment proceedings were brought against various judges on account of the exercise of the power, none of these proceedings were successful.

But although few thoughtful men would deny to the courts the power to pass upon the constitutionality of statutes altogether, there is much to be said in favor of the suggestion that that power should only be exercised in cases of comparative certainty and that that certainty should be in the minds of at least two-thirds of the sitting judges.

A decision of a supreme court is handed down and announced as a judgment of the court as a whole and not of its individual members, and time and time again the doctrine has been announced that

"The question whether a law be void for its repugnancy to the Constitution is a question of

much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case. It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." [4]

More than once Chief Justice Taft has announced that the Court in many of these questions has been but feeling its way, and no one can read the opinions in the recent Minimum Wage Act case,[5] and their exhaustive review and attempt at reconciliation with the prior decisions, without a covert smile at the intellectual gymnastics therein indulged in and without finding an added proof of the fact that a five-to-four opinion hardly ever lives as a precedent, but is sooner or later modified or overruled. It is true that these momentary checks to our impetuous, idealistic, and often reckless democracy always serve a useful purpose in giving the legislators and their constituents an opportunity for further consideration and for a second thought, but that second thought has almost always been in accordance with the dissent-

[4] Chief Justice Marshall in Fletcher *v.* Peck, 6 Cranch 87-128.

[5] Adkins *v.* Children's Hospital, 43 *Supreme Court Reporter* 394.

ing opinions and the rebuff has only tended to suspicion and to hostility. It is to be remembered that five-to-four opinions are rarely to be found in the cases which deal with strictly legal controversies. They are to be found in those cases where social and economic and political questions are involved. The judges differ on questions of fact and of exigency and of governmental expediency and not of law. They differ, not because they are lawyers or trained in the law, but because some of them are individualists and some of them are collectivists. The primary function of the courts, indeed, is to administer the established law and not to decide economic controversies.

But after all is said, there has been a good deal of a tempest in a teapot, and perhaps, with the sole exception of the Dred Scott decision, no lasting harm has been done by any of these decisions, save and except the friction and disrespect of the courts which has been their unfortunate result. So far, it would seem that not more than fifty acts of Congress have been declared unconstitutional during the history of our government, and it is only in rare instances that state laws are interfered with by the Federal Court. As far as the state courts are concerned, the tendency is more and more to yield to the legislative discre-

tion, and the former so-called reactionary decisions have almost everywhere been overruled.[6]

The real danger in fact lies in the growing fear of the national tribunal to exercise its powers, and in an extension of the congressional policy of centralization which may be ruinous in its consequences. In the past the Supreme Court of the nation has maintained some semblance of the American doctrine of dual sovereignty, but now by the extension of the interstate commerce powers of Congress, which it is every day sanctioning, there is a tendency to make Washington the lobby camp of the world and practically to destroy the last vestige of states rights; and not only is this the case, but the "general welfare" clause of the Federal Constitution has been so extended, and appropriations for all manner of causes which formerly were looked upon as matters solely of state concern are now being so lavishly made, that the burden of taxation is becoming more and more intolerable. This perhaps is inevitable, perhaps this is what the people desire, but the fact is none the less apparent. But whether inevitable or not, it would seem that there should be some arbiter in the controversy

[6] See cases collected in dissenting opinions in Adkins *v.* Children's Hospital, 43 *Supreme Court Reporter* 394.

and some body which should be entrusted with the power of defining the constitutional limitations of the national and of the state legislatures.

Certainly these considerations should furnish a conclusive answer to the suggestion that a decision of the Supreme Court of the United States should be subject to reversal by the members of the houses of Congress. They do not, however, satisfy the protest against the five-to-four decision.

In the several states there are no rival legislatures and therefore no need of an arbiter between them. There the fundamental question is whether we desire court control in local matters. Are we willing implicitly to trust to our legislative assemblies or should we place upon our legislators the entire responsibility. Should we seek to protect them and the public from the mistakes of temporary enthusiasm or the pressure of organized and militant minorities? Should we still attempt to protect the individual from the tyranny of the majority? Are there and should there be any fundamental rights which our legislatures are bound to respect? Should we implicitly rely on the sense of law and order and fair play of the public and of our legislators? Should we premise an at all times wise, well informed and beneficent democracy?

"It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by Parliament of which these barons were a controlling element. It was not in their minds therefore to protect themselves against the enactment of laws by the Parliament of England." [7]

But did we at the time of the Revolution, and have we now occasion to fear the power or unwisdom of legislative assemblies? In his *Democracy in America* De Tocqueville says that "the power of the judiciary to declare a law invalid if it transcends the powers given by the Constitution, is one of the strongest barriers ever devised against the tyrannies of political assemblies." But do we now need that protection? It is quite certain that we needed some protection against the Navigation Acts and other excesses of the English Parliament and that the failure of that protection made the American Revolution necessary; yet in that Parliament we had no representation. Is the fact that we are represented

[7] Miller J., in Davidson *v.* New Orleans, 96 U. S. 97.

safeguard enough? There are at least some, and the author is among them, who still believe in the value of the sober second thought; who believe in democracy but who recognize the difficulty which is attendant upon the gathering and the dissemination of the truth and of the facts; who desire a thoughtful democracy and not a thoughtless democracy, and who still believe that some judicial check is still necessary, subject always, as it is, to the right of the people, after due consideration, to amend further their constitutions.

But though we have advocated a court control and have expressed the belief that the American courts have not been guilty of a usurpation of power in passing upon the validity of statutes and in applying the test of the constitutions, we still believe that there is much foundation for the claim that at times they have imagined constitutional limitations where none have existed, and that to this extent they have been usurpers. Often in the past, though not so often to-day, they have failed to realize that they are servants of specific, definite and written constitutions and not the servants of any abstract theories of governmental and individual rights; they have failed to realize the fact that, since in America we have enumerated and formulated our basic rights and

have definitely prescribed the powers and the limitations of government, we have left no room for the assumption that the courts are the guardians of any supposed natural rights or of any supposed super-constitution. We may make the general statement that in a legal sense in America men and women have no natural and inalienable rights except in so far as our written constitutions have guaranteed them; that the Federal Congress has no powers except those which have been expressly delegated to it, or which are reasonably necessary to the carrying out of those which have been so delegated; and that the power of the legislatures of the several states is supreme except where that power has been limited by their own constitutions or by that of the central government.

The English Constitution is more or less unwritten. Even the clauses of Magna Charta, at first class conscious and aristocratic, have been democratized by the British popular thought and by the British judicial decisions. The right to a trial by one's peers, which originally had merely implied the right of a baron to be tried in his own baronial court, has long since been expanded into the right of all persons to a trial by jury, which was the last request that the barons would have made. The phrases, "No freeman shall be dis-

possessed" and "Nor will he come upon us except by the law of the land," no longer are construed as the demands or the rights of a privileged class of freemen, for now all are free; nor do they now merely express an aristocratic protest against the practice of sending the royal troops to reduce to obedience and to punish a local landed aristocracy which claimed the right to pillage the wayfarer and to be responsible only in their own courts. No longer are they merely the protest of those who on several occasions had hung the royal sheriffs on their castle walls. Magna Charta indeed has long been superseded, and popular rights are now recognized which were not dreamed of either by the framers of that instrument or by those who drew up the various bills of right which have followed in its wake. These rights, however, and these limitations on government, have not, in England, been formulated into any new charter or into any new constitution; and only the English courts or the English Parliament, which sits as a legislative body and as a constitutional convention in one, can define the scope and the limitations of government and say what the present-day rights of Englishmen really are.

In America, on the other hand, we deliberately

reduced and formulated. We created written guarantees, and we created courts to protect and to enforce those guarantees. We attempted to create instruments which should express the democratic ideals of the age, but which at the same time should express the limitations of democracy. We provided for the amendment of our constitutions so that the instruments could be elastic and so that democratic progress should not be checked. It would seem that there is no ground for the assumption that there are or were still other rights which it is the peculiar function of the courts to protect, or other limitations on the powers of government which they are expected and required to impose. It is chiefly by ignoring these facts that our American judges have erred in the past, and it is by doing so that they have created a large measure of the popular distrust which now prevails.

Most of these errors have been committed in relation to the fifth and fourteenth amendments to the Constitution of the United States, and to their counterparts which are to be found in the constitutions of all of the states. These amendments provide that "no person shall be deprived of life, liberty or property without due process of law," and that no state shall deny "the equal

protection of the laws." Perhaps the courts have erred in their construction of the term "due process of law," and in their assumption that that process was anything more than a process and a procedure; that is to say, a constitutional legislative enactment and a day in court. Even if the right to set aside a statute on the ground that it infringes on personal liberty be conceded, it is very doubtful if, in many instances, our judges have given to the words "liberty" and "property" the meaning which the constitutions intended. Sometimes they have unwisely superimposed their own conception of the measure of the liberty and property rights that should have been granted rather than the measure that was actually guaranteed. At times they have erred in holding that on questions of wisdom and of necessity they could, and should, overrule the wisdom and discretion of the sovereign legislatures.

It was never intended, nor is it ever necessary, that on questions of fact and of necessity and where the legislatures, acting within their special domain, have fairly and clearly spoken, the courts should oppose their ideas and their judgments to those of the popular assemblies.

It was never intended that the courts should assume the right to invalidate statutes in which

the legislatures limited the hours of labor in employment that they regarded as dangerous and unhealthy, because the courts might believe that those employments are not injurious. The members of the legislatures come fresh from the people. They can appoint committees and they can investigate. Usually they are practical men of affairs. It would seem that their opinions and judgments upon a question of fact and of expediency are as reliable as those of the more or less cloistered judges. They, at any rate, are acting within the scope of their general jurisdiction.

Have not the courts in the past attempted to save our legislators from too much responsibility? Are not many foolish laws passed for political reasons which would not be passed at all if the members of the legislature had not been led to believe that no harm would result since they would be sure to be tested in the courts and be declared invalid? There has indeed been altogether too much of this legislative juggling and shifting of responsibility.[8]

[8] The Illinois legislature (Hurd's *Revised Statutes*, 1917, c. 46, Sec. 312) enacted not only that employers should give their employees an opportunity to vote, but that they should pay them for the time consumed in so doing. Surely the legislators did not believe in the validity of this enactment. They surely did not believe that the time had come in America when the

The doctrine that on a question of fact and of necessity the Supreme Court of the nation may oppose its judgment, not merely to those of a state legislature but to those of the state courts, and that on like questions of fact the state tribunals may overrule the judgments of their own legislative bodies, is a doctrine which has no sanction in the evolution of our jurisprudence. It can only be asserted on the theory that our legislative bodies are undemocratic, unintelligent, and unrepresentative; and this is a theory that can hardly be safely asserted in a virile democracy.

The doctrine of judicial control in these matters has been grafted upon but has not been rooted in English or American jurisprudence. It is open to the charge of class pride and class prejudice. It was not, indeed, until after the Civil War that the supremacy of the courts was

state could compel one class of its citizens to pay another for the privilege of exercising the right of the franchise which is the privilege and the duty of all. Clearly the act was passed to gain votes. Clearly the legislators anticipated that it would afterwards be invalidated by the courts. "Why not, and in order to gain the Irish vote, make St. Patrick's day a holiday, without deduction of pay? Why not accord a similar privilege to the Scotchmen on St. Andrew's day and to the Welshmen on St. David's? Why not pay the orthodox Christians for observing their Sabbath and going to their churches? Why not gain the favor of the playwrights by subsidizing those who go to the movies?" 18 *Illinois Law Review* 56.

ever asserted in relation to the acts of a popular parliament or of a popular legislature, when that body was acting within its legislative domain. In England the doctrine was primarily announced as a check to an unlawful exercise of the royal prerogative and never as a check upon the popular parliament, after that parliament had once assumed form and had become in any manner representative. It was asserted for the purpose of keeping the king from encroaching upon the prerogatives of parliament, and not to prevent parliament from encroaching upon the prerogatives of the king. In America, until after the Civil War, and up to the decision of the so-called Railroad Commission Cases in the year 1886, it was only asserted for the purpose of keeping the different branches of the state and national governments within their respective spheres of action and from encroaching upon one another. The struggle for popular control in England which culminated in the famous case of *Wilkes* v. *Wood,* and *Entick* v. *Carrington,*[9] merely resulted in the doctrine that no act done severally by the king, the lords, or the commons, or their agents or servants, in excess of their powers as defined by the statute or the common law, could preclude

[9] 19 Howell's *State Trials,* 981, 1029.

judicial inquiry or be an answer to a suit brought for redress. It was seldom, if ever, contended that the king, the lords and the commons, acting conjointly and within their jurisdiction (and these constitute the British legislative triumvirate), could be controlled by the courts and that their discretion could be interfered with. Almost all of the conflict between the judiciary and the law-making and the law-enforcing power centered around the exercise of the royal prerogatives and the functions of the administrative bodies and tribunals.

What our legal and political revolutions really emphasized and made clear was the supremacy of the popular law and of the *express* constitutional provisions, and the duty of the public officials to yield obedience thereto, and not the right of the courts to set their individual opinions of expediency and advisability against those of the popular sovereign as represented in the popular legislative assembly or the popular constitutional convention.

The conflict is between two basic theories which are totally opposed to one another. The one was expressed by Mr. Justice Miller when, in the case of *Loan Association Company* v. *Topeka,*[10] in

[10] 20 Wall (U. S.) 655.

holding invalid a tax in aid of manufacturing enterprises, he said:

"It must be conceded that there are rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the prosperity of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all, but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

The other was expressed by Mr. Justice Clifford when in his dissenting opinion in the same case, he said:

"State constitutions may undoubtedly restrict the power of the Legislature to pass laws, and it is plain that any law passed in violation of such a prohibition is void, but the better opinion is, that where the constitution of the state contains no prohibition upon the subject, express or implied, neither the state nor federal courts can declare a statute of the state void as unwise, unjust or inexpedient, nor for any other cause, unless it be repugnant to the Federal Constitution. Except where the Constitution has imposed limits upon the legislative power, the rule of law appears to be, that the power of legislation must be considered as practically absolute, whether the law operates according to natural justice or not in any particular case, for the reason that courts are not guardians of the rights of the people of the state, save where those rights are secured by some constitutional provision which comes within judicial cognizance; or, in the language of Marshall, Ch. J., 'The interest, wisdom and justice of the representative body furnish the only security in a large class of cases not regulated by any constitutional provision.' Courts cannot nullify an act of the State Legislature on the vague ground

that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implication of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the Constitution and the people, and convert government into a judicial despotism."

These two opinions suggest the controversy and the reasons advanced on either side. In the past the reasoning of the majority opinion prevailed. Of recent years, however, and with few exceptions, that of the minority opinion has generally been followed by both the state and the federal tribunals.[11] Perhaps if the more liberal construction had sooner prevailed there would have been less popular unrest and less demand for the recall of judges and of judicial decisions.

[11] See cases analyzed in the dissenting opinions in Adkins *v.* Children's Hospital, 43 *Supreme Court Reporter* 395. See also opinion of Mr. Justice Miller in the so-called Slaughter House cases, 16 Wall (U. S.) 36. See also Munn *v.* Illinois, 94 U. S. 113; Powell *v.* Pennsylvania, 127 U. S. 678; Muller *v.* Oregon, 208 U. S. 412; Frazier *v.* North Dakota, U. S.

CHAPTER IV

THE NEED OF CLARIFYING THE LAW

A DEFENSE of the American supreme courts and the assertion of their value as pieces of governmental machinery and as bodies determining public policy does not necessarily involve a defense of all their methods and practices. It does not necessarily include a justification of the uncertainty of our judge-made law, and of the lack of clarity for which the judges themselves are responsible and with which the intelligent public is every day becoming more and more impatient. If everyone is presumed to know the law, then certainly the law, and especially constitutional law, should be more within the intellectual reach of the average citizen. He should, at least, have some means of ascertaining his legal rights.

At present there is such a mass of conflicting decisions even in the same court, and the art of refinement and discrimination has been carried so far, that the lawyers and the judges themselves are in hopeless confusion. Seldom, indeed, can

the conscientious lawyer tell his client positively that he will either win or lose his case, even where a jury trial is not involved. Often he admits that a law suit is, after all, something of a gamble, and adds, "No one knows what the Supreme Court will do."

It is very necessary that our appellate courts generally, and our Federal Supreme Court in particular, should redefine their positions and should codify, as it were, much of their judge-made law. It is necessary that they should return once more to basic principles and begin to argue from them in a manner which the intelligent public can follow and understand. In this age of impatient democracy, we must be prepared to accept, once and for all, the fact that the public will never be satisfied with fine-spun webs of legal subtlety which draw distinctions where none really exist.

The fear of overruling previous decisions—a fear which the public by no means shares—has so paralyzed our courts as to render them at times almost ridiculous. The Supreme Court of Illinois, for instance, held in 1894 that an eight-hour law for women was invalid.[1] It declared it to be an unreasonable interference with personal

[1] Ritchie *v.* People, 155 Ill. 98. See "The Illinois Ten Hour Labor Law Decision," 8 *Michigan Law Review* 2.

liberty and to be unnecessary for the preservation of the health of those concerned or for the welfare of the general public. It even characterized it as an attempt to put women under a legislative tutelage, and as an insult to both the employer and the employee. In 1910 the court was called upon to review this decision and to set aside or sustain a new law which differed from the former only in that the limit of the hours of labor was ten instead of eight hours.[2] This second statute the court sustained and held to be necessary for the public welfare and for the health of those immediately concerned. But instead of admitting fairly and squarely that they had erred in the past, the judges in this second opinion seemed to forget all that they had said before about class legislation and legislative tutelage and the insult to free labor, and they justified their yielding to the legislative discretion largely by explaining that in this new act the hours were ten and not eight, and that in the new act the preamble had stated that the purpose of its passage was "the protection of women and of the public health," which statement had been omitted in the former enactment.

What difference, we may ask, and the intelli-

[2] Ritchie *v.* Wayman, 244 Ill. 509.

gent public will always ask, did this statement or preamble make? For what other purpose could the first act have been passed? The courts must presume a purity of motive and some intelligence on the part of the legislatures. The real fact of the matter was that in the first case the court was not fully informed concerning the necessity and, therefore, the reasonableness of the legislative measure. It was impossible, indeed, that it should have been. Before the year 1894 there had been little scientific or medical investigation of the effect of long hours of labor on the health of women. However, during the fifteen years which elapsed between the passage of the two acts, a large amount of original investigation was undertaken and hundreds of valuable documents and books on the subject were published. In the first of these cases the court erred honestly because of the lack of scientific knowledge, for which it was not responsible. In the second case the scientific information or evidence was available and the court decided rightly. Why, we ask, did not the court say this instead of trying to draw a distinction between the two cases where none existed? Why was a broad-minded and really courageous opinion weakened in this way and made to contain a purely technical distinction

which could accomplish no purpose except to weaken it as a precedent and to add further confusion to the law? Are we to understand that the legislature must placard every statute, and that without such a placard an act will be invalid? Must, indeed, the motive and purpose as well as the subject be clearly expressed in the title?

There is nothing which is sacred in the doctrine of *stare decisis*. There is nothing which is sacred in any theory of law or of governmental policy which has outlived its usefulness or which was radically wrong at the beginning. Respect for the courts and for the law may be won, it is true, by a respect on their part for the precedents of the past and an obedience to the law and a reasonable consistency. Much of our business stability rests on the basis of a wise conservatism. But, after all, society must progress. It must grow wiser and more humane, and it will never consent to be restrained in its advance by ill considered precedent. Truth is truth, and logic is logic. A complete change of front is not less complete because an attempt has been made to justify it by a process of reasoning which itself ignores logic and distorts premises, or by an effort at reconciliation with prior decisions where no reconciliation can logically be made.

Many of the decisions of the Supreme Court of the United States are subject to the same criticism. The decision in the so-called *Original Package Case* of *Leisy* v. *Hardin*[3] fairly and squarely overruled that in the so-called *License Cases*[4] and yet it did not say so. The decisions in *Delameter* v. *South Dakota*[5] and *In Re Rahrer*[6] overruled in fundamental principle those of *Leisy* v. *Hardin*[7], *Bowman* v. *Railway Co.*[8] and a long line of other decisions; and yet in them the judges sought merely to draw impossible distinctions. The decision in *Lochner* v. *New York*[9] overrules in principle that in the cases of *Holden* v. *Hardy*[10] and of *Powell* v. *Pennsylvania*,[11] and yet no confession of error is made.

In the License Cases the court held valid a state statute which regulated the sale of liquor in the original package, and held that a law which was passed, not for revenue nor for commercial

[3] 135 U. S. 100.
[4] 5 Wall (U. S.) 462.
[5] 205 U. S. 93.
[6] 140 U. S. 545.
[7] 135 U. S. 100.
[8] 125 U. S. 465.
[9] 198 *U. S. Reports* 45.
[10] 169 *U. S. Reports* 366.
[11] 123 *U. S. Reports* 678.

purposes, but to protect the morals and welfare of the people of a state, was not an interference with interstate commerce, though it might incidentally affect it. It held, in other words, that the commerce clause of the Constitution was never intended to deprive the individual states of the inherent right of self-protection. In *Leisy* v. *Hardin* and in *Bowman* v. *Railway Company* the court took an opposite view and held that the power to regulate commerce was exclusive and that it applied to the regulation of the sale of liquor in the original package. In *Delameter* v. *South Dakota* and *In Re Rahrer* the court upheld a statute of Congress which redelegated this control to the state, though it had before insisted that the control of Congress was exclusive and could not be redelegated.

What is true of these cases is true of scores of others. Time and again we find opinions which in fundamental principle overrule long lines of earlier decisions and announce a complete change of front, but which are so lacking in candor that the change is hardly apparent. Instead of confessing error they often seek to make distinctions where none exist, or none that the ordinary mind will ever be able to see or to appreciate. The United States Supreme Court seems

to have taken the position that it would be utterly derogatory to its influence to admit that it ever erred, and that to overrule a former decision fairly and squarely would wreck the ship of state. This practice has been followed by only too many of the state courts, and the result has been a tangle of legal refinement and sophistry which is getting greater and greater every day. Each new distinction, each new surrender of basic principles and of irresistible logic, paves the way for still further surrender, makes the law less and less certain, and encourages that class of lawyers, now only too common, whose main business seems to be to teach their clients to violate the basic principles of social and human kinship, and by use of delay and obstruction to hinder, if not to prevent, all progress and all reform. The art of refinement and discrimination may have been carried too far by our courts, and frankness may now be the imperative need.

After all, it is obedience to the letter and to the spirit of the Constitution that is required of our courts, and not obedience to any particular construction which they or their predecessors may have put upon it. Many of the past constructions were adopted under social and industrial conditions totally different from those which now

prevail, and are not adapted to our modern life and to our commercial and national growth. Many, too, were adopted without sufficient deliberation or information. There is no reasonable ground for this dread of overruling prior decisions. The public has lost its respect for law, not because it has been changed from time to time to meet new conditions or because it has now and then corrected long standing errors, but because of its growing over-refinement and incomprehensibility.

We need to make the law, and especially constitutional law, intelligible to the ordinary intelligent citizen. Our courts must sooner or later codify in some way and get at the original text once more. They must fairly and openly, and not merely by innuendo,[12] reject much of the mass of conflicting judge-made law that has gathered around the constitutions, so that we may really know where we are and what is the law. We need a fresh start. We need a constitutional

[12] Chief Justice Taft would use the term "sub silentio." See comment in the Minimum Wage case of Adkins *v.* Children's Hospital, 43 *Supreme Court Reporter* 394, on the supposed overruling (Mr. Justice Sutherland and the majority of the court say that there was no overruling at all) of the prior decision in the New York Bakers' Case of Lochner *v.* New York, 198 *U. S. Reports* 45.

reformation that shall sweep aside much of the interpretation of the priests and scribes of the law and enable us to begin anew. We need to return to the Constitution in the same way in which the Puritans of the Reformation returned to the text of the Scriptures. We need a reinterpretation of that instrument, not in the light of the mass of conflicting decisions and distinctions which have grown up around it, but in the light of present-day facts and knowledge and necessity. This, however, would make little change in our basic law or in the conclusions arrived at in our most recent decisions. It would merely clear away the conflict and the rubbish. It would place the law and these decisions upon a logical foundation, and would support both by a reasoning that could be followed and understood.

Even though there may be much unnecessary rubbish in the law books and in the written opinions of our courts, there is no reason to sympathize with the protests, now quite common, against the writing and printing of judicial opinions, nor, to any great extent, with the demands for their shortening and curtailment. On the carefully prepared written opinion depends not only the orderly growth of the law, but its unswerving righteousness. The written opinion is

the result of the desire for a government of laws and not of men, and for a government by principle and reason and not by prejudice and passion. This fact even many practicing lawyers fail to recognize. The digest-making writer of law books realizes it but little, and the general public not at all. The public knows nothing of the duties and responsibilities of the judge of an appellate court. It has no realization of the fact that each supreme-court decision becomes a guiding rule in thousands of other controversies; that the body of our law always has been, and always will be, judge-made rather than legislature-made; that usually it is the cases where doubt exists that are appealed; that the lawsuit itself is the exception, since most controversies are settled without suits; and that one appellate court case rightly decided and carefully and thoughtfully expressed furnishes a rule of public and business conduct which, if observed, will prevent numerous other controversies. The thoughtless observer and the ordinary critic of the judiciary desire haste rather than judgment and a government of men rather than a government of laws. He fails to recognize the paramount necessity of making the administration of the law respected by the litigants and their counsel, and of making these persons

realize that though they may be defeated and their contentions overruled, it was not through inadvertence or neglect, but after a full and thorough consideration.

It is easy for a judge to brush aside a case by saying that it is "a kindergarten case" and is not worthy of consideration. It is easy to adopt the rule that, "where the judgment of the lower court is affirmed, no opinion will be written." These practices, however, do not satisfy litigants and their attorneys, for these persons often protest that "any fool could do that without even looking at the brief or at the record of the testimony." It is easy enough to brush aside an appeal by saying, "The court has examined the objections of the counsel and finds that there is no merit in them, and the judgment of the lower court is therefore affirmed"; but how can counsel be sure that the objections have been looked into and examined? As a matter of fact, does it not often happen that a point in which at first there appeared to be no merit is found, after a more thorough examination, to be of great and even of controlling importance? There is, indeed, no better method of examination than that which is afforded by writing an opinion in which one is compelled to put down in black and white his

reasons and his conclusions. The popular clamor for hasty and perfunctory decisions must result in judicial laziness and in a judicial despotism instead of a government by law. Thus do the thoughtless bring about the development of that very judicial despotism against which they declaim.

The well considered written opinion is absolutely necessary to a democratic government of laws as opposed to an autocratic government of men. It is the great safeguard against judicial tyranny. When judges are required not only to arrive at and to announce their conclusions, but also to give the reason for the faith that is in them, they will seldom knowingly go astray. The opinions of our appellate courts are printed in the published reports. In them the judge is writing his own record and is erecting a monument that will endure for centuries. If truth and logic are in it, it will be a heritage prized by his descendants and those who bear his name. If falsity and sophistry lie beneath, it will serve not as a family escutcheon, but as a fool's cap or the brand of a rogue.

There are few men, no matter how thoughtless or lazy or even corrupt they may be, who are willing to print lasting falsehoods which will be

scrutinized by the lawyers and thinkers of all times. Few men are willing to place themselves in the pillory of the centuries. There is much wisdom and reason in the section of the North Dakota Constitution which provides that "where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefor shall be concisely stated in writing."

CHAPTER V

ARE THE COURTS RESPONSIBLE FOR LAWLESSNESS?

THE *usual* is not news, and is therefore not headlined in the daily papers. Because of a few foolish decisions and because, in a momentary lapse of intellect, the Supreme Court of Missouri reversed a criminal conviction on account of the omission of the word "the" before the word "State" in the formal expression "against the Peace and Dignity of the State of Missouri," the public has come to believe that these lapses of intellect are common; that everywhere the criminal is going unwhipped of justice, and that the appellate courts are the cause of this undoing. Just as in the presence of one defaulting bank president we shut our eyes to the existence of the thousands of officials whose probity cannot be assailed, so in the presence of one miscarriage of justice we often forget the thousands of cases in which it has been rightly administered.

The fact is that a very small number of crimi-

nal cases are appealed at all, and that the majority of the reversals even are due to the mistaken zeal of our prosecuting attorneys and to errors in the trials in the lower courts which could have been easily avoided and which only too often have been purposely committed.

In the years 1914, 1915 and 1916 an average of some two hundred persons were confined in the North Dakota penitentiary, to say nothing of those criminals who were serving sentences in the various municipal and county jails. We have no definite record of the number of arrests and much less of the crimes committed for which no arrests were made, but the figures given at any rate show a goodly number of criminal trials and a goodly number of criminal convictions. During the period mentioned, however, only fifteen criminal cases were appealed to the supreme court of the state.

Some years ago, Chief Justice Orrin N. Carter made an investigation into the condition in Cook County, Illinois, and came to a similar though a more startling result. He found that from December 1, 1908, to December 3, 1909, there were 4,091 criminal convictions, and that out of this number 45 were appealed to the higher courts; that from December 3, 1909, to December 3,

1910, only 37 appeals were taken out of 4,484 convictions. He also found that in three fifths of these appeals the judgments of conviction were affirmed.

These illustrations are drawn from the agricultural state of North Dakota, and from Cook County of Illinois, in which the metropolis, Chicago, is situated, and are thus illustrative of the conditions in the country as a whole. If they are illustrative, it is absurd to contend that the appellate courts are responsible for the lawlessness that exists in America. It is well also to remember that the cases which are appealed usually involve new and exceptional points; and such being the fact, it is not strange that at least a fair proportion should be reversed.

The real reason for the majority of the reversals in the American appellate courts is not to be found in an overrefined judicial technicality, not in the neglect of duty on the part of our judges, but in the overzeal of the lawyers and of our prosecuting attorneys and often also in the incompetency of the latter; and for this the public itself is generally to blame. There never yet was a lawyer who was half as mean and contemptible as some of his clients wanted him to be and who, no matter how dishonest and corrupt, was not

urged to even greater shortcomings by an importunate client. Our states attorneys are usually elective officers with the primary and general election ever before them, and the voters insist on judging their efficiency by the number of convictions that they obtain. Only too often, therefore, they seem to think that their province is to convict rather than to do justice.[1]

The newspapers give columns to the occurrences at the trial before the jury; they give only a few lines to the proceedings in the appellate court. The prosecuting attorneys, therefore, too often look upon a criminal prosecution as an opportunity to make a personal reputation; and once they have entered upon the trial of a lawsuit, they feel that they must win before the jury at any cost. Only too often, also, counsel ask questions which they have no right to ask, argue propositions of law that they know are not well founded, and trick rather than aid the trial judge. If there were more knowledge and candor

[1] Often, too, in order to gain a personal reputation or to satisfy the popular clamor, our state's attorneys prosecute men for offenses of a higher and grosser degree than those which actually have been committed. They will seek to convict and will often convict one of murder when he has committed only manslaughter; and of grand larceny when he has committed only petty larceny.

on the part of the prosecutors there would be fewer grounds for appeal and usually just as many convictions would be obtained. If, as a rule, a higher class of lawyers were willing to defend our suspects, the honest prosecuting attorney would not feel, as he often does to-day, that he "must meet fire with fire" and sharp practice with sharp practice, and the cause of justice would be greatly promoted.[2]

[2] There is much in the suggestion of Mr. Raymond Moley, where on page 54 of *An Outline of the Cleveland Crime Survey,* published by the Cleveland Foundation, he says:

"The replies to a questionnaire sent to all the members of the Cleveland bar developed the startling fact that, except in extraordinary cases and with a very few notable exceptions, the better members of the Cleveland bar ignore criminal practice entirely. Of the replies received, 40 per cent accepted no criminal cases whatsoever, while only 3 per cent took criminal practice regularly. The reasons given for not accepting criminal practice were in most cases financial, while others expressed ethical or esthetic objections.

"Mr. Bettman's conclusion as to this avoidance of criminal practice is as follows:

" 'As a result, with some notable and praiseworthy exceptions, the practice in those courts is left to the lawyers of lesser sensitiveness regarding professional practices. The criminal branch of the administration of justice, dealing as it does with the protection of the community against crime, the promotion of peace, safety, and morals of the inhabitants, the lives and liberties of men, and, therefore, from any intelligent point of view, the more important branch of the administration of the law, has become a sort of outlaw field which many a lawyer avoids as he avoids the slums of the city.

" 'Criminal practice must be made a field in which the lawyer and the gentleman (in the American sense of that word) can feel at home. And one of the courses which might promote this is for the lawyers, who are both lawyers and gentlemen, to return to the first principles regarding the position of the

Many criminals escape conviction because of the incompetence of our prosecuting attorneys and because our American democracy has been so impetuous in its desire to reward political activity and to push forward the young and to offer an opportunity for the making of reputations and the earning of a livelihood, and has been so insistent on short terms of office and frequent elections that it has paid but little consideration to the real interests of the public.

"In all of our state and national tribunals," says an eminent legal writer, "criminal prosecutions are carried on by an officer chosen for the purpose. He has great power; he can ordinarily prevent the grand jury from finding an indictment; for he is their adviser, and he draws it. And after it is found he can refuse to prosecute it. He should, therefore, possess that element of a great lawyer, integrity, in the highest degree. In mental habit he should be exact, and his legal learning should be the amplest. One thus endowed need never permit an offender to escape

lawyer as an officer of the law and accept criminal practice. If the man accused of crime knows that he can obtain first-class talent at a reasonable compensation, he will have no excuse for taking his case to the shyster or police court hanger-on, and both the courts and prosecutors will then have some justification for feeling particularly suspicious and cautious in cases in which the defendants retain unscrupulous or disreputable lawyers.'"

from the defect in the indictment, though the judges hold him strictly to the old rules. And if the people confer the office on an aspirant whose sole qualification is that he can bawl loud and long at the hustings, they ought not to complain when criminals escape through his blunders or slothfulness. There is no just ground for removing by statute any bar which liberty has put up to protect her children." [3]

If the poor are usually convicted while the rich often go unwhipped of justice, we ourselves are to blame and the reason is apparent. We elect boys or politicians as state's attorneys in order to give them jobs. Many of them are absolutely untrained in the law and most of them are inexperienced. After they have been in office for a few years and have learned to try cases and have attained some knowledge of men and of juries and of the law, we refuse them reëlection and elect others who are incompetent. This is an unfortunate result of our elective system and of our democracy. In the first place they are young men and need work, or, if politicians, they demand recognition for party services. After they have been in office for a short time they make enemies of the criminal class. These men work

[3] Bishop's *New Criminal Procedure,* Vol. I, Sec. 26.

against them at the elections but their friends are passive.

The rich criminals or suspects hire the best lawyers they can obtain, and the boys are no match for their antagonists either in their knowledge of the law or in handling juries. The poor man, however, has to employ cheap counsel. Often an attorney is appointed by the court to defend him, and this person is usually a boy or one equally inexperienced; even if he be a well trained lawyer, since he gets practically no compensation and takes the case merely as a matter of duty, he often gives to it but little attention. So, too, the rich man can afford the expenses of an appeal while the poor man cannot. We need better trained prosecuting attorneys and a longer tenure of office; and we need public defenders as well as public prosecutors.

It is true that in cases of great notoriety special counsel are often retained by the state. But even here error lies, for the special prosecutor only too often feels that his reputation is at stake and that he must obtain a conviction from the jury at any cost. He therefore, only too often, tricks, rather than aids, the jury and the trial judge. Only too often he argues that, if only a verdict can be obtained, his reputation will

be made or will be preserved, and that, even if the case is appealed and the judgment is afterwards reversed for the errors for which he himself has been responsible and of which he was all the while cognizant, he can escape condemnation by denouncing the supreme court and by charging its members with incompetency, a love of technicality, and perhaps with dishonesty. These charges the public will be only too ready to believe; for they know nothing of the trial save what they gather from the newspapers, and the opinions of the supreme court they never read.

We allow our police to violate all law and all decency and then wonder why our trials take so long.[4] We first try our criminal cases in the magazines and in the newspapers and then com-

[4] In England the spirit of fair play is everywhere present in the administration of the criminal law and it everywhere results in the saving of time and unnecessary delay. There, for instance, but little time is wasted over the question of the admission in evidence of involuntary confessions, because, instead of being illegally sweated, the accused, when arrested, is warned that anything that he may say will be used against him. In England, therefore, a confession, if made at all, is usually voluntary and, being voluntary, there can be no question of its admissibility in evidence. Here, only too frequently, confessions are extorted by the torture of the so-called "third degree," and they are therefore usually repudiated and their introduction in evidence is vigorously assailed.

plain of the time that is consumed in attempting to obtain unprejudiced jurors. We hound our prosecuting attorneys to convict and applaud them only as they convict and then wonder why the upper courts sometimes reverse the verdicts which they obtain. Many of our legislatures insist upon the death penalty, but, when brought face to face with the question, the average juror refuses to be a party to shedding another man's blood.[5]

In our large cities, often because the offices of our states attorneys are undermanned, and often at the request of politicians, and sometimes even that the professional bondsmen may profit, cases are continued and the filing of informations and complaints is delayed until the witnesses have disappeared or have been tampered with; and in those states where in serious cases an indictment by the grand jury is necessary, the time which

[5] The writer knows of an instance in which a supreme court justice walked the floor night after night in agony hoping and praying that he could discover some error in the record of a trial which would justify him in refusing to sanction a death penalty, and who compromised the matter by extorting from the members of the board of pardons a promise to commute the sentence to life imprisonment.

The delay in selecting the jury in the McNamara case was due to the fact that juryman after juryman stated that he was opposed to capital punishment and was therefore discharged.

elapses between the arrest and that indictment accomplishes the same results. All of these abuses, however, are abuses of administration and of politics. They cannot as a rule be laid at the door of either the courts or the juries.

In speaking of this subject Mr. Raymond Moley, in his *An Outline of the Cleveland Crime Survey,* says:

"It is not difficult to see that efficient and honest prosecution constitutes the very essence of an adequate administration of the criminal law. If cases are improperly prepared, or if they are carelessly presented, the offender has every opportunity to escape the consequences of his act. The prosecutor has great discretionary power . . . he may keep cases out of court by a simple refusal to prosecute. The court must largely depend upon his recommendations to *nolle* a case—so much so that in the survey 'nolleing' is usually referred to as a function of the prosecutor, whereas it is technically a function of the court. . . . The force of the municipal prosecutor's office consists of the chief prosecutor and six assistants. These officials are appointed by the city director of law, who is at least nominally the chief municipal prosecutor. The chief prosecutor has nominal control over the other prosecutors, although at

the time of the survey this control was not permitted to be vigorously exercised. . . . The most severe criticism made in the survey concerning the personnel of the office was of the practice of giving out appointments to the prosecutor's office, seemingly for no reason except to satisfy the requirements of large racial or national groups in the community. Thus we have men appointed to the prosecutor's office not because they are experienced in the law or in meeting a certain class of cases that come into the prosecutor's office, but because they are Poles, Czechs, Jews, Italians or Irish. This practice which Mr. Bettman calls 'the tribalization of prosecution' has been characteristic of this office almost from the beginning. . . . The office of the prosecuting attorney of the Municipal Court handles about 75,000 criminal matters a year. Yet that office has no managing clerk or other clerk, it has no files and no records, it has no stenographers. It drops cases with or without filing a prosecution, entirely without any statement or record for this action. No record is made of the information which it receives, so that the particular assistant who tries the case has in his hands no data and, with rare exceptions, must trust to luck as to what the witness will say. There is no specialization of the work. There is none of the efficiency of

organization characteristic of a large modern law office. It is largely a game of chance." [6]

It is clear that everywhere in America [7] we need an efficient business police organization which shall be free from politics and from political control. We do not need to change the basic law as much as we need to change the machinery of prosecution. A judge should not be required to supervise the criminal machinery or the office of the public prosecutor, nor should he be required to be a policeman. Often he is required to decide between the police and the persons whom they arrest and, if he would be impartial, he should not fraternize too much with either. He must be permitted to be a judge and be held solely to the responsibilities of a judge, and the responsibility for the arrest, the prosecution, the preparation for trial, and the bringing to trial must be placed upon the administrative officers.

The curse of the American administration of the criminal law, is our system of politics, our

[6] An *Outline of the Cleveland Crime Survey,* by Raymond Moley, p. 7.

[7] What is or was true of Cleveland is true of Chicago and of almost any large American city. Since the making of the survey, indeed, Cleveland has been making remarkable improvements in its criminal administration.

spoils system, the fact that the under-world has a vote as well as the upper-world, and above all the short tenure of office of all our public officials. Our frequent elections make our politically elected and controlled police officers and magistrates unwilling to enforce the law and to complain of wrongdoing; and the officers of the law are looked upon as servants and inferiors and not as the agents of a superior government. Often, in the cases of great strikes and industrial disturbances our public officials are afraid to incur the political hostility of either of the contestants. On the one hand they stand idly by and see the employers take the law into their own hands, and mount machine guns and employ gunmen; and, on the other, they allow "the scab" to be assaulted and mutilated without protest.

Our boys and girls grow up in an atmosphere of license, and all of us are parties to the lawlessness that is among us. We are willing to prosecute or to complain of the tramp or of the stranger within our gates, but we need the friendship, the business and the political support of our next door neighbors. If the owner of an automobile is arrested for violating the ordinances in relation to speed, he considers the action of the officer a personal offense and his last thought is to

look upon himself as a criminal. Often, if he is a man with political power, he will use his influence against the officer who arrests him. When the Illinois child-labor laws were first enacted an attempt was made to enforce them against a prominent glass manufacturer. The answer was not a confession of guilt, as it should have been, but an appeal by the defendant and by the local politicians to the governor for the removal of the factory inspector. On the other hand, much of our anarchy and unrest and much of the overcrowding of our courts is due to our practice of judging the effectiveness of our police by the number of arrests that they make, and, in many states, to a fee system which renders the making of arrests officially profitable. The American constable and policeman is primarily an arrester and billet wielder, while the English policeman is primarily a peacemaker and a trouble preventer. Even a slight acquaintance with the history of the administration or rather the maladministration of the law in our large cities will show that often the most anarchistic and lawless of Americans are the American police, and in many instances the American police justices. Especially is this the case in the foreign quarters where the defendants are unable to use the English language and are

unacquainted with the rights which the American law has given to them.

Not only are needless arrests made for petty offenses; not only is the omnibus charge of "disorderly conduct" made to cover acts which the law never intended to punish, but men and women are passed before the bar of justice with as much speed and with as little consideration as the cattle in our slaughterhouses. In the place of a steady and persistent enforcement of the law, without fear and without favor, there has been an open toleration of, if not connivance with, the lawbreaker, or at any rate with so many lawbreakers or classes of lawbreakers that other classes have come to the conclusion that there is no intention to enforce any law. Whenever public attention, however, has been called to any evil, the police have felt it incumbent upon them to make a show of diligence by wholesale arrests, often without warrants or evidence of authority, and by breaking into and entering without evidence places which they themselves, with evidence, have tolerated and often patronized for many years.

In all these matters they have too often gone beyond the law, and the consequence has been that the law has come to be in ill repute. The public, and especially the foreign element thereof, has

come to look upon the power of the police as an arbitrary power exercised as the result of prejudice and not of right or good government. The violence and lawlessness of the means used by the police have emphasized and encouraged violence and lawlessness of others.[8]

We should bear in mind the fact that the nihilist in Russia was, with but few exceptions, originally a theorist and a non-resistant; that he

[8] In the campaign which was waged in Chicago some years since by Miss Jane Addams, of Hull House, against the political boss, John Powers, three policemen stood by and saw a political supporter of the party of Miss Addams assaulted by a mob of Italians and driven from the polling place, and instead of arresting the assailants, searched the victim to see if he carried concealed weapons upon his person. At the time of the assassination of President McKinley, Miss Emma Goldman, who was believed to have incited the deed, eluded the vigilance of the police for nearly three weeks; a show of diligence, however, appeared necessary, and in order to make such a showing every one who bore the name of anarchist, whether a scientific anarchist, a terrorist, or a socialist, whether a follower of the non-resistant Tolstoi or of the terrorist, bomb-throwing Nicolai Russakoff, and whether man, woman, or child, was arrested without warrant, without the filing of a complaint, and was denied the right of giving bail or of consulting counsel. The evil was not righted until Miss Jane Addams, of Hull House, herself a Quaker non-resistant, called attention to the fact that among those arrested was a young girl who had not passed the doll period, and that the surest way to encourage and promote anarchy was for the authorities themselves to brush aside the law and themselves to become anarchists.

became a terrorist and began to resort to the bomb only after the Russian government had itself become anarchistic, and after some fifty of his number, who had been tried and acquitted by the courts, had been arbitrarily exiled. Often the mob itself becomes politically powerful and the means which have been used to suppress it in the past may in turn be used by it for the destruction of property and of property rights. The ruling classes of Russia gave to the Russian people their first lessons in lawlessness. They are to-day reaping that which they have sown.[9]

Obedience to the law and reverence for it do not come from many arrests. They come from the ethical nature of the law, from its reasonableness, from the unswerving justice and evenness of its enforcement, from the people's knowledge of what it is and their belief in its righteousness. The manufacturers of Illinois first banded together and formed an association for the purpose of opposing the child labor law of that state. When, however, they studied the act and became satisfied that it was to be enforced without fear

[9] The anarchy of the Haymarket riot in Chicago was the indirect if not the direct result of a long period of anarchy on the part of the Chicago police and of the Chicago police justices which led to a widespread disrespect for the law and for its officers.

and without prejudice, they ceased their resistance and gave to it their approval.

We require so many affidavits and on such trivial occasions that we have cheapened the oath and have destroyed its solemnity. We have legislated and forbidden too much and we arrest too often. Instead of legislating against, and making unlawful, that which the public sentiment condemns, our reformers seek to create the sentiment by first declaring the act unlawful.[10]

Necessary and justifiable as our prohibition

[10] "Thus, the multiplicity of laws does not tend to develop a law-abiding spirit. This fact has often been noted. Thus Napoleon, on the eve of 18th Brumaire, complained that France, with a thousand folios of law, was a lawless nation. Unquestionably, the political state suffers in authority by the abuse of legislation, and especially by the appeal to law to curb evils that are best left to individual conscience.

"In this age of democracy, the average individual is too apt to recognize two constitutions, one, the constitution of the state, and the second, an unwritten constitution, to him of higher authority, under which he believes that no law is obligatory which he regards as in excess of the true powers of government. Of this latter spirit, the widespread violation of the prohibition law is a familiar illustration.

"A race of individualists obey reluctantly, when they obey at all, any law which they regard as unreasonable or vexatious. It has always flourished, and the so-called 'best people' have not been innocent. Thus nearly all women are involuntary smugglers. They deny the authority of the state to impose a tax upon a Paquin gown."—Address of James M. Beck before American Bar Association, September 2, 1921.

legislation may be, there is much ground for the belief that it would have been better if the reform had come about by more gradual processes, and few will contend that the public sentiment is as yet fully prepared for it. Few will at any rate doubt that its open disregard by the thousands of professional and business men who on all other occasions preach obedience to the laws, and the failure of the state legislatures and of the national Congress to employ and to make appropriations for the hundreds of thousands of additional police officers who are necessary for its enforcement, has led to a contempt for all law and for all government.

Of course, we should punish crime, and our judges and police officers should be held to the strictest responsibility, but we should not expect the impossible from them. The prison, indeed, seldom reforms, and punishment is at the most a social palliative and not a cure. The statistics show that a large number of our most serious offenders are repeaters,[11] and there can be no

[11] On September 2, 1921, in an address before the American Bar Association Judge Marcus A. Kavanagh of the Superior Court of Cook County, Illinois, said:

"Imagine if you can, an army of 136,700 women and men marching under their divisional banners through the streets of this or any city, clothed in uniform, marshaled by officers,

question that many of these repeaters and many of those who have committed crimes of extreme

headed in line by 14,000 savage-hearted men and women who have taken the lives of their fellows. Next to these, first shall march 5,000 robbers and 18,000 burglars, each a potential murderer. Then in order, tramp 3,000 furtive-eyed thieves; after these 9,000 unclean wretches who have committed irreparable crimes against the wives and daughters of other men; and thronging behind them come at last the many thousands of other miscreants who have unjustly inflicted suffering and loss upon their fellow citizens. If your imagination thus serves, it has but grouped and visualized the last United States census reports upon the subject we are considering. Suppose also, that while the shrinking spectators stand watching, this ghastly army breaks ranks, scatters to cover, then no doubt your imagination will pause from other efforts to picture the panic and dismay of the beholder. Well, as a matter of fact, that army has broken ranks. The computation dates from 1910; the prisoners of that year have nearly all served their terms and one-third of them, after a career of danger and loss to the public, have served other terms in addition. Their ranks have been vastly recruited. The mighty army continues to increase its war against society, is more persistent, more baleful than ever before in the history of any country. Their cost in mere money to the nation is enormous. It is a pretty safe conjecture that today and all days of this year, 150,000 persons either convicted of, or charged with crime, wait behind steel bars. It is also true that the number increases beyond all reason in comparison with the ratio of increase in our population. These prisoners cost the taxpayers of the country $54,750,000 a year for their mere food and keeping. They cost thrice that amount to watch, pursue and convict before they came into prison. They have cost almost as much as the second sum in the waste and breakage of property they have wantonly occasioned. The misery, agony, terror and physical suffering that band has created among innocent people is incalculable. The situation presents a more forbidding phase still. Not only is the number of crimes and of criminals steadily increasing, but the number of recidivists is accumulating in even greater proportion. Nothing in the situation could portend worse than this fact. It demonstrates that our system has failed to reform, and that the law's penalties fail to deter—in other words, that our laws are not fulfilling their office—protecting the law-abiding. Judge Wadhams is reported as saying that one third of the inmates of our prisons are repeaters. It must be remembered that the

cruelty and of violence have been practically insane. If insane, they should have been isolated

more skillful of our criminals are not caught. That only the duller minded, as a usual thing, are convicted. A study of the mentality of prisoners affords no real clew as to the average intelligence of the criminal.

"During the past few years I have visited many prisons where I talked personally with wardens, guards, chaplains and convicted. In preparation for the honor you do me today, I addressed a questionnaire to 65 heads of the sixty-five great prisons of the country and I am of the opinion that the statement of Judge Wadhams is within the fact rather than over it. There are few penal institutions in which it is possible to get the correct records of prisoners. So many scattered small prisons keep no record at all. Recently the statistical clearing house at Fort Leavenworth has recognized the urgent need for this important information, but to this hour there is no way to ascertain the real facts. For example, from one great prison of the country the official report shows one-third of the inmates to be repeaters, but the chaplain of the prison confided to me his private memoranda which disclosed that more than one-half had been convicted before. The police in Chicago say, and I make no doubt those in other great cities claim as well, that from 85 to 90 per cent of the more serious predatory crimes are committed by men who had before suffered sentences short or long, mostly short, in some prison.

"Twenty-one thousand one hundred forty-two persons last year were brought before the identification bureau in Chicago charged with all sorts of serious or petty offenses. Of these ten thousand two hundred and forty-six were identified as having formerly been under sentence. It is claimed by the officers in Chicago that, because of no sufficient system of co-operation throughout the country, many repeaters escape identification. In Auburn State Prison where a capable, scientific consideration is given to the matter of identification, out of a total population of one thousand two hundred ninety-two, it is found that six hundred and fifty-one are first timers and five hundred and forty-one are second timers.

"In the United States penitentiary at Atlanta, out of one thousand eight hundred and ninety-eight prisoners, seven hundred and thirty-three have been convicted before. Of these last, one hundred and eighty-six had two previous convictions; seventy three previous convictions; forty four had four previous convictions; nineteen had five previous convictions; ten had six previous convictions; twelve had seven previous convic-

and detached from the rest of the community before the harm was done. In every case of a second offense the judge should inquire into the mental condition and the heredity of the defendant and often this should be done upon indications of lawlessness and before any overt act is committed. It is, in short, far better to confine a madman before he has committed a murder than to hang him afterwards. No less an authority than Judge Harry Olson, who for many years has been the Chief Justice of the municipal court of Chicago, and for many years prior thereto a prosecuting attorney, appears to be firmly of the opinion that nearly all the murders which have occurred in Chicago during recent years have been committed by men whom the authorities should have known to be insane, and who should have therefore long since have been incarcerated. The tendency of to-day should be towards fewer criminal judges and fewer peni-

tions; five had nine previous convictions; two had ten previous convictions; one had twelve previous convictions; one had thirteen previous convictions; and two had sixteen previous convictions.

"I think it only fair to say that from a study of the answers to my questions, these two prisons merely mirror the actual conditions in most American penal institutions. In some southern penitentiaries where the lot of the convict is not exactly one of pampered ease, the number of repeaters runs as low as eight per cent."

tentiaries and more medical experts and farm colonies.[12]

[12] See "Crime and Heredity," president's address, delivered by Harry Olson, Chief Justice of the Municipal Court at Chicago, at the eleventh annual meeting of the Eugenics Research Association on June 16, 1922. In this address Judge Olson said:

"So far I have emphasized mental deficiency in connection with crimes of violence, but mental deficiency lies equally at the bottom of all crime, the type of crime depending upon the nature and extent of the defect. This is made apparent in the Thirteenth and Fourteenth Annual Reports of the Municipal Court of Chicago, pages 188 to 250, where the diagnoses of a large number of law breakers, their type of crime, and their criminal histories, are recorded. An indication of the type of defect most common may be gathered in a list of 2,000 cases.

"The judges send only suspected cases to the laboratory. Out of 779 cases in the Boys Court, there were 654 suffering from dementia præcox, or about 84 per cent; 109 psychopathic constitution, or about 13 per cent, and 10 epilepsies, or less than two per cent.

"In the Morals Court, out of 464 cases of females, 260 or 36 per cent were dementia praecox; 92 psychopathic constitution, or 19 per cent, and 4 epilepsies, or less than one per cent.

"Out of 359 cases of males in the Morals Court, 107 were dementia præcox, 110 psychopathic constitution, and 4 epilepsies.

"Out of 657 cases of males in the Domestic Relations Court, 236 were dementia præcox; 295 psychopathic constitution, and 3 epilepsies.

"In the outside criminal branches of 270 males, 107 were dementia præcox; 68 psychopathic constitution, and 5 epilepsies.

"Out of 152 females, 84 were dementia praecox; 41 psychopathic constitution, and one epilepsy.

"You will observe, therefore, that dementia præcox plays the highest rôle and is the criminal psychosis par excellence.

"The persons of stunted intellect and moral defects are scattered all through society. They account for the greatest burden of educators, from the kindergarten to the university. They account for many of the wife desertions, the bizarre and often cruel domestic entanglements, and the divorces. They account for the carelessness, the irresponsibility and the quarrelsomeness, which check industrial production. They account for

We are expecting too much of the courts. Much, no doubt, remains to be accomplished in

some of the needless civil litigation and for much of the lying of witnesses.

"Now, what is the great menace from irresponsibility at the present time? Obviously it is the easy reproduction of the unfit. The majority of competent men and women are putting rigid limitation upon the number of their offspring. It is the natural reaction of their sense of responsibility. The defectives have as much instinct for reproduction as normals, some of them much more. They lack the innate inhibitions against easy and rapid reproduction.

"And what has society done in the face of this threatening situation? Has it made it difficult or impossible for defectives to propagate?

"On the contrary, society has devoted itself with frenzied zeal to encourage the propagation of the unfit. It does this in both indirect and direct ways; indirect, by placing no bar to the union of the unfit, direct, or the union of unfit with the fit; by exerting itself in every conceivable way that nature and science can suggest to keep alive every child born to the unfit and to feed and develop every such child until he or she is old enough to reproduce (excepting, of course, the imbecile and the idiot).

"Psychopathic surveys of definite districts in New Jersey, New York, Indiana, Minnesota, and other states in recent years have proved the tendency of subnormals to mate with their kind. They multiply more rapidly under the protected environment which modern society so generously provides than normal stocks, which subject themselves to severe limitations. This thing is going on in every state and every city, worse perhaps in some places than in others, but capable of spreading like typhus or plague from place to place.

"There have always been defectives and defective stocks, but until quite recently the environment of northern peoples was so harsh and rigorous that the defective stocks tended constantly to be uprooted, to be bred out. The defectives had much the higher mortality rate, especially among infants. Now we find the ordinary conditions of a century ago, to go no farther, absolutely reversed.

"We cannot do what our ancestors did at a not remote period, put to death every incorrigible criminal. That would help us out to a considerable extent, but it is impossible. We cannot deport our undesirable stocks. We have not been able thus far to keep other countries from unloading on us. We

the way of procedural reform, but in the main we are blaming the machinery of justice when we should seek for and should eradicate the causes. The growing disrespect for the law in America is not due to our procedure nor to our judges or juries but to our own lack of religion and of reverence. It is due to our cosmopolitan citizenship, to the unavoidable friction of diverse races, and to the fact that for many generations we have been made the dumping ground of the criminals and mental defectives of Europe, as well as

cannot unsex all our defectives. That would be the easiest, the cheapest and the surest method. It would purify the life stream in a few years. But public opinion will not at this time sustain such practices on a scale commensurate with the need.

"There remains seemingly but one alternative, which is to segregate the defective delinquents in state controlled colonies where the protective environment which they need can be created. Under such control there is an abrupt end to criminal depredations and to reproduction. Both great needs of society are met. The need of the individual defective is likewise met, for he is given an opportunity to live to the limit of his powers, whatever that limit may be in each individual case. He will have all his worries and troubles removed, existence will no longer be anguish and agony for him, but a sensible balancing of work and play.

"These farm colonies for defectives are soon to be common enough. They will be in operation long before people generally realize the momentum which real race suicide has gained. They will greatly reduce the cost of the defective to society generally and to the state. For the defective will be able to pay his way when given proper restraints and wise management. And other institutions which are well intended, but have practically failed because defectiveness was not understood will be relieved and permitted to accomplish some good."

the land of opportunity for its most aggressive and enlightened citizens. It is due to the fact that we import and use more narcotic drugs than any other nation and even in these days of prohibition we allow the bootlegger to sell liquor from "the hip" and in the streets, and to tempt our young men in the hotels and in the dance halls. It is due to the breaking down of the home. It is due to our feverish and dissatisfied democracy.

The nation was born in revolution, and most of our immigrants have come here because of some dissatisfaction with some established government and with some established law. Many have renounced their allegiance to the old and have sworn allegiance to the new, yet they have not acquired a sense of loyalty to the new and know nothing of its traditions and of its past. Many have no conception of what liberty means, nor do they understand that their own freedom involves the freedom of others, and a democratic and established law which curbs the excesses of all in order that all may progress. To many our codes of social and sexual ethics appear tyrannical and absurd. Many, especially those who come from Russia and from southeastern Europe, have moral theories which are different from our own.

Here we have concentrated all the races of Europe and here are the seeds of all the racial antagonisms which have kept Europe at war during the centuries. It is not surprising that we should have more murders and more assaults than occur in the more or less homogeneous European states. There racial assaults and murders are international and take the form of wars; ours are intra-national and are crimes.

Here also we have had the individualism of the frontier which has always rebelled against restraint. We have had the unavoidable unrest and dissatisfaction of a democracy. We have cast aside ancient tradition. We have cast aside much of its reverence. In 1850 De Tocqueville said that western Pennsylvania was "a region where there was no reverence for ancient traditions, no respect for distinguished service nor for a life that has been spent in doing good. People there were there; but society was not among them." And this, even to-day, is true of many of our cities and many of our communities. Men and women are on the make. They are jealous of one another. They are money mad. They have exalted the thing above the idea and the ideal. Bankrupts that we are, we have put our religion in the names of our wives. In our mad scramble

for wealth and for power and for pleasure we and our children have forgotten reverence and have forgotten God. We are lawless because we are irreverent. We are discontented because we know no law and can brook no restraint.

We ask the immigrant to forswear allegiance to the old and to be loyal to the new; yet we ourselves belittle that which we ask him to revere. For political purposes, and in order that our magazines and newspapers may sell, we lampoon our judges and even the chief executives of the nation. We then wonder why the newly made citizen is often only a citizen in name and for what he can get out of it, and that he has no love or respect for the government which he has sworn to uphold or for the flag which he has sworn to protect.

We headline crime everywhere in our newspapers and picture it in our play-houses and in our theaters. We have made it a familiar thing. We have been living in an automobile age, in an age of social display. Parents have set the pace and their boys and girls have followed. Money talks and everyone is after the money. Pleasure is the one end. In the mad search for pleasure, forgery is an incident and theft is common. In the movies our young people are shown the glitter of the

cabarets and of the dancing houses and of the gambling joints. In the movies they are taught how to steal. We need reverence and contentment more than we need a reformed criminal code. We need God more than we need the law.

CHAPTER VI

THE COST OF LITIGATION. THE CONTINGENT FEE

THE administration of justice is too expensive both to the litigant and to the public, yet, contrary to the popular idea, the greater part of this expense is not to be charged to the salaries of the judges or even to the fees of the attorneys but to cumbersome methods, to the charges of stenographers and of printers, and to the perquisites of unnecessary political employees.

The complaint is especially applicable to the federal courts. There, in addition to other fees, the clerk of court has a monopoly of the copying of the records and of the pleadings. The litigant could himself copy, or get a private stenographer to copy these records and pleadings at a moderate cost. He must, however, pay the federal clerk for copying them for him. Added to these and to the other court fees are the fees of the court stenographer, which the litigant must pay, and the large cost of printing the briefs and abstracts, and often orders and pleadings. The average crimi-

nal appeal costs in the neighborhood of fifteen hundred dollars. In a recent civil case which took less than three days to try, the costs of appeal, exclusive of attorney fees, were in the neighborhood of six hundred dollars.

A summons is merely a notice to appear in court and to answer to a complaint that is filed against you; and a supbœna is merely a notice to a witness to appear and give testimony at a certain time. If the parties are really notified of what is expected of them, then all that is necessary is done. Every attorney is an officer of the court as well as an advocate and special pleader, and can be disbarred or otherwise summarily dealt with for dishonest or dishonorable conduct. He is, as a rule, a trained lawyer and a gentleman, and he can certainly be trusted as much as the ordinary sheriff, constable, or even United States marshal. It would be an easy thing, when a summons or a subpœna is required to be served, to hand it or to mail it to some attorney residing in the vicinity of the person sought to be notified and to obtain him to make the service. This in fact can be done under the laws of many of the states. The cost, at the most, in practically no instance would exceed five dollars; in many cases it would not be more than one dollar, and in many more

there would be no charge at all. And yet in the federal courts, and in many of the state courts, this work must be done by the marshal or sheriff or constable, and this merely that a political appointee may have fees. For this service the officer is usually paid a mileage of ten cents both ways, and in some federal districts double fees. For many years the office of sheriff of Cook County, Illinois, was estimated to have a yearly value of at least seventy thousand dollars, and in some states it has been considered so highly that constitutional provisions limit the holder to one term.

In the federal courts and in states like Illinois, where the distinction between law and equity is preserved and the master in chancery, with his justice of the peace fee prerogative, flourishes, the costs of a proceeding in chancery, however simple, are prohibitive. Often the fees of the stenographers, who have their own trusts, and of the master in chancery are utterly disproportionate to those of the counsel in the case and to the amount of money involved. They are always absurdly disproportionate to the fees paid to the circuit court itself and to the salary of the circuit judge. In a foreclosure suit, in the city of Chicago, which involved some eighteen thousand dollars, the cost of the trial in the court below and the

expenses of appeal to the appellate court were, exclusive of attorney's fees, $2,181.49. Of this amount $1,226 was paid to the master in chancery, $570.55 to the court stenographer, $257.55 to the printer, $40.00 to experts, only $13.44 to other witnesses, and only $83.95 as the costs of the clerk and of the sheriff and of the circuit court itself. When we consider that the salary of the circuit judge in Chicago is $12,000 and that in this one small foreclosure case the fees of the master in chancery were $1,226, and that the master is appointed by the circuit judge so that each judge or chancellor is supposed to have his master, we can see how sometimes it happens that political henchmen are appointed as masters and in this way are rewarded for bringing about the election of their superiors and supporting "the ticket." It is well to remember that the profits and fees of litigation do not all go to the lawyers.

So too, we have needlessly multiplied courts and needlessly multiplied appeals. Instead, indeed, of making litigation cheap to the poor man, we have made it needlessly expensive. This we have done by insisting upon the fee system and by retaining in our judicial system the useless and archaic office of the justice of the peace, and of

allowing appeals to intermediate courts. The justice of the peace is rarely a lawyer. He is paid by fees, so that the more suits he has to try the more money he makes. In cities, great collection firms practically have their own justices of the peace, and the business of one law office will often make a justice independent. The abuse has become so flagrant that the term "J.P.", which these officers affix to their names, has often been held to be synonymous with "Judgment for the Plaintiff." The justice, at any rate, usually knows no law and nothing of the rules of evidence, and the result is that the litigants are rarely satisfied with his judgments, and appeals are taken. These may be taken to the district courts and again appeals can be taken to the supreme court. On the way are all the expenses of the justice's fees, the constable's fees, the witness fees and mileage in the justice and district courts, and the expenses of the trials in the district and supreme courts, to say nothing of the fees of the stenographers and of the lawyers.[1]

In a number of states appeals can be taken from the county courts and probate courts to the dis-

[1] In recent years the establishment of municipal courts and small-claims courts in many of our cities has done much to minimize these evils.

trict courts, and from these to the supreme court. In most of the states the county and probate judges, though dealing with the estates of deceased persons and the interests of widows and orphans, and handling matters of enormous importance, are not even required to be lawyers. It is therefore but natural that their judgments should often be questioned and that appeals should often be taken.

A very large part of the expense of litigation is to be found in the charges of the stenographers; yet the tendency to-day is more and more to curtail the powers of the trial judge, and the more that we do this and the more we make him an umpire and not a director the more must irrelevant testimony be injected into the records and be required to be transcribed in the case of future proceedings or future appeals. The cases, indeed, are very numerous where the fees of the stenographers have been greater than those of the lawyers, and there have been many cases in which the lawyers have been compelled to go without compensation at all in order that these fees might be paid and in order that their clients might have the advantage of an appeal. This evil is especially noticeable in cases in equity which are referred to masters in chancery or other referees

who are to take testimony and to report to the trial judge. There usually the master has no power to exclude irrelevant testimony and all that the objector can do is to register his objection which will later be passed upon by the regular judge. This necessitates transcribing the whole record.

We need more salaried judges and fewer feed masters in chancery; and much of the delay and of the expense of the law is due to the unwillingness of the public to supply the want. The majority of our federal judges have always been overworked, and the passage of the eighteenth amendment has added largely to their burdens.[2] Alleged criminals, and even witnesses, are often held in prison for months because there is no judge to try the case which may vindicate them, or before whom they may give their testimony. These persons usually lose all respect for the law and become anarchists.[3] But the evil is not only with

[2] The pending criminal indictments in the federal criminal courts increased from 9,503 in the year 1912 to 70,000 in the year 1921. Of this number 30,000 arose under the prohibition statutes. On July 1, 1921, there were 142,000 civil and criminal cases undisposed of in the federal courts, on July 1, 1922, the number had increased to 172,000.

[3] The same complaint appears in England. In a recent number of the *Law Journal* we find the following:

"It is a grave reproach to English justice that every year

the federal courts. In spite of a recent addition to the number of their judges the courts of Chicago are still nearly two years behind their calendars and the same situation exists in nearly all our large cities.

These excessive costs and these unnecessary delays close our courts to the average citizen, and even the business man foregoes many a right before he will go to law. After all, litigation is not the thing which is most to be feared in a free country. In a large measure the ability and the willingness to assert one's rights makes a free people. The necessity to forego the assertion of these rights and continually to compromise has the opposite effect. We have carried our prejudices against litigation too far and we have allowed the fee system too large a control. The theory that all litigation must pay for itself and that those who dance must pay the fiddler is a dangerous social doctrine. When the early writers evolved the theory that "the law abhorred litiga-

two or three hundred accused persons should be kept in prison three or four months before they are brought to trial, a substantial number of whom are found to be innocent when at length they are brought before a jury. The proposals of the Home Secretary to remove this blot from our legal system—proposals which ought long ago to have been brought forward—will be waited with keen interest, more particularly as they may involve the reform of the circuit system in other respects."

tion" they were merely protesting against the use of the courts for the oppression of the weak. They never intended that their theory should be used as a pretext by which the poor man could be excluded from the courts and from the equal protection of the laws. The best antidote for anarchism is to implant in the minds of all the belief that at the great bar of the law all are equally favored and that poverty in America does not stand in the way of complete justice and of equal opportunity.

We cannot afford to slight even the petty controversies of the poor nor seek to overcome a scarcity of judges by hurrying through the trials of those cases which are of little import. We cannot afford to let the poor man lose his faith in the administration of the law. The decisions of all our judges should be well considered. We need more courts and judges and a simplification of our practice, but not more haste on the part of the judges that we have. We do well to spend millions of dollars every year on education; we do well to have parks; we do well to have asylums; and we should also do well in being lavish, in being extravagant, if necessary, in preserving intact the great sources which make democratic governments possible among men. The law's delays

are the source of much justifiable criticism, but in our protest against cost and delay we should not expect the impossible. For many years, the courts of a number of our metropolitan cities have been lamentably undermanned. In Chicago a judicial system and a quota of judges designed for a city of hundreds of thousands has been expected to do the work of a city of two millions. Yet the only criterion the popular press seems to have of an efficient judge is whether he "gets through his calendar." The consequence is that thousands of cases are hurried through and are unfairly and arbitrarily tried, and that the miscarriage of justice is appalling. The remedy is more judges, and not more haste. There has indeed been manifested a total inability to understand the enormous social and political importance of the judiciary and the enormous burdens that it bears.

It is well to remember that out of our hundred million people, over thirty million are either foreign-born or the children of the foreign-born, and that comparatively few of us can trace an American origin for more than two or three generations. It is well to remember that we are a nation of nations rather than a race or a people, and that the history and tradition of such a nation is world wide in its origin. It is not American.

It is not even Anglo-Saxon or British. It is not even exclusively that of the English-speaking peoples. Such a nation can only be bound together by that which is common to all and which appeals to all, and by that for which all of the liberty-loving people of the world have throughout the centuries been striving, in every nation, on every revolutionary battlefield and at the scaffold and on the gibbet, and that is, a common democratic hope and a common democratic law. It is above all necessary that the administration of that law should be kept pure and that its protection should be freely accorded to all. It is necessary that as a people we should believe in that law and in its administration, and that the sense of justice should be satisfied.

If we consider the important functions which they perform, we can hardly grudge the money which is spent on our courts, nor, on account of the increased but comparatively trifling expense, can we oppose the movement which is now generally being made for an increase both in the number and in the salaries of our judges. According to a valuable pamphlet which was published in January, 1921, by Alexander B. Andrews of the North Carolina bar, the per capita cost of our supreme courts runs from the trifling sum of

49.496 cents in Nevada to the still more insignificant sum of .654 cents in Texas, while that of the other courts averages 14.479 cents per capita and varies from 71.541 cents in Vermont to 3.389 in North Carolina and 2.135 in Maine. We have recently been told that the cost of a modern battleship is about $45,000,000, which would mean a national per capita charge of 41 cents.

Much of the discredit of the courts of to-day is due to the injudicious utterances of the practicing lawyers, and many of these criticisms are due to the contingent fee. The contingent fee is a fee which is taken by the attorney out of the judgment or settlement obtained and which is made contingent upon the obtaining of that judgment or settlement. The author is not one of those who favor doing away with the fee altogether, though this has been advocated for many years, and in England the right to exact such a fee has never been recognized. The refinements of ethical theory cannot overcome plain ethical and economic facts, and if contingent fees in certain cases, such as personal injury suits, are not allowed, the poor man often will have no redress and men and women and children may be maimed and mutilated with impunity.

But be this as it may, we are satisfied not only

that the practice has been much abused but that it has brought discredit both upon the lawyers and upon the courts. From the very beginning the plaintiff's lawyer obtains a direct interest in the litigation and has become a speculator, a business man and a party plaintiff, and has ceased to be a lawyer. After a verdict has been obtained he has an interest in the judgment and feels a bitter and personal resentment against the trial judge who for any reason sets aside the verdict, or against the members of the supreme court who may reverse the judgment upon appeal. This resentment he is not slow to express and it is by no means unusual for him not only to charge all manner of judicial obliquity in his conversations with his clients, and while in street cars and in other public places, but to do all in his power to secure the defeat of the offending judges when they seek reëlection. The latter tactics no doubt are followed also by some corporations in many instances where the judgments of the courts are adverse to them. Their methods, however, though often fatal to the judges, bring no discredit on the courts. Sometimes, no doubt, they use their influence against the offending judges, finance campaigns against them, and take advantage of the system of primary elections to

urge men to get into the field who, though they themselves cannot be elected, will draw away much of the support of the sitting judge. But this is done in secret. The public are not told, as in the other instances, that the judges are tyrants, that they are bought, and that they are overruling the rights of the sovereign people and of the American juries.

The contingent fee, in short, has a tendency to make the lawyer forget that he is an officer of the court and that as such he should be vitally interested in maintaining a due respect for the law and for government, and its evils are everywhere apparent.

CHAPTER VII

THE ELECTIVE AND THE LIFE-TERM JUDICIARY

THE uncertain tenure of office of the American judges has had much to do with the delays and uncertainties in the administration of justice. Making the holder of the scales of justice a political football can hardly be promotive of judicial impartiality and of judicial equanimity.

Our democratic desire to maintain a popular and ever-present control over our courts and to give everyone a chance and an equal opportunity has made our state judiciary altogether too unstable and has resulted too often, not only in the election of incompetent and untrained judges, but in the denial, even to those who are competent, of an opportunity to familiarize themselves with their duties, to acquire the judicial mind, and to really settle in the harness. A judge needs to be trained as well as a trial lawyer, and the tenure of office is often too short to make this possible. A lawyer fresh from the active practice is rarely at first able to fill the judicial office with satisfaction and to adapt his method of thinking to his

new position. In the past he has of necessity been an advocate and a partisan. Now he must be an arbiter and a judge. In the past he has been a specialist. Now he must interest himself in, and familiarize himself with, the whole field of the law. In the past his duty has been to talk. Now it is to listen. Formerly he was interested in the question of the legal possibility and the question whether a certain thing could be legally done. His immediate interests were those of his client. Now they are broader. Formerly he could get along and perhaps could succeed without any broad conception of social needs and of social aims. Now, if he would really serve his state, if he would really do justice to litigants and to the public alike, he must be conversant not merely with technical law but with history and economics and sociology. Often he has come to the bench totally unprepared for its duties and must begin, as it were, his professional training anew. What, for instance, does the personal injury specialist know of the rules of commercial law, or the criminal lawyer of the law of real estate? Yet the judge must know all things. At his bar must be tried all classes of cases; in this age of specialization he alone is denied the right to specialize.

A government by law must find its foundation

in a respect for its administrators. There never can be any large measure of respect for the American judge and for a government of law as long as the judicial primaries exist and, in them, any lawyer, no matter how incompetent he may be, is able and willing to throw his hat into the ring. There can be no respect for the law as long as the candidates for the judicial office resort to the methods of the demagogue and of the ward heeler. A primary election system compels the judges who are already in office and who seek reëlection to beg for votes, and no judicial officer who does so can be respected. The honorable refuse to do this and sooner or later the honorable usually fail of reëlection. Something indeed is wrong when judges, such as Cooley [1] of Michigan,

[1] A misleading statement is to be found in *Great American Lawyers,* Vol. 7, p. 485, to the effect that: "Judge Cooley retired from the Bench in 1885, for the purpose apparently of devoting himself to his University duties and to literary pursuits and of giving some attention to private practice." The fact is that Judge Cooley was defeated at the spring elections in 1885 by Allen B. Morse but his term of office did not expire until December 31 of that year. After his defeat at the polls he tendered his resignation to take effect October 1 and the man who defeated him was appointed by the governor to fill the remainder of the unexpired term. The opposition to Judge Cooley arose out of several libel suits which had been decided against the defendants, though, as is usual in such cases, another reason, that of too strong corporate leanings, was made the ground of the political attack and given public prominence.

Mitchell of Minnesota and McClain of Iowa are driven from the bench.

A sitting judge cannot possibly carry on a successful political campaign against an aggressive and conscienceless antagonist. He is supposed to administer the established law and he cannot promise to carry out the will of the temporary majority. A member of Congress or a candidate for the legislature, perhaps, can do these things. He can argue policies on the rostrum and on the stump and can promise to carry them out. He can dissertate at length on the achievements of himself or of his faction or party. He can pledge and he can promise. He can reward his friends. The judge, however, can promise nothing. He can reward no one. Justice should be blind. Even though his decisions are misquoted, the jurist has no means of defense. He cannot even conduct a campaign or ask others to do it for him. How can an honest judge ask men and factions and interests to work for him at election time when he knows that during the next month or year these men or factions or interests will have lawsuits in his court which he must pass upon and decide? A congressman or senator may, with a measure of personal honesty, be loyal to his supporters and to his friends; a judge must have no friends.

It is very clear that both in the national and the state courts the desideratum is an appointive life-term judiciary which shall hold office during good behavior and be subject to removal by impeachment and by impeachment alone. It must be clear to all that the real judge is at the mercy of every politician and every "gumshoeing" judicial aspirant, and that as long as the present system prevails not only will honest men be constantly denied reëlection, but many of our best lawyers will dread the uncertainty and will refuse to enter the judicial office. The popular pendulum, however, is swinging away from, and not toward a life-term judiciary, and such a judiciary is provided for in none of the state constitutions which have been adopted during the last fifty years.

In America, indeed, the life-term judge is more distrusted than the elective judge; and no one who is conversant with the thought of the labor unions which so largely control our city politics and of the farmers' unions which so largely control those of the country districts, will believe for a moment that even the federal judiciary would be secure in their life terms if the matter were put to a popular vote. From the time of the American Revolution down to that of Theodore Roosevelt there

has been a constant minority protest against the action of the supreme courts in passing upon the constitutionality of statutes. Of recent years the use of the injunction in labor disputes has everywhere been met by the charge of a judicial oligarchy. Everywhere there have been muckrakers and everywhere there is the hostility of disgruntled and defeated litigants.

But the opposition is deeper than this. It is an inevitable result of democracy. The average American citizen is naturally distrustful of unlimited power on matter where it may be lodged. We are mainly Protestants or the descendants of Protestants and the Protestant has always protested. We are pioneers or the children of pioneers, and the pioneer has always been an individualist. The American ideal of a government of law rather than of men is itself based upon a distrust of those in authority, and it is difficult for the average man to realize that a government of law is an impossibility without the aid of some court which shall interpret and which shall enforce.

The protection of the courts and of the constitution is seldom sought by the majority but usually by the under-dog and by the minority, and the majority always chafes at restraint. It would

not if it thought, for the majority is made up of individuals who by themselves are powerless and any one of whom may at some time need the protection of the courts and of a government of law; but in the heat of the moment the temporary majority does not think and, thanks to the demagogue and to the yellow journals, it is so often fed on falsehoods that even the thought of its cooler moments is unavailing.

What we need for the perpetuation of democracy and of a government of law is a dissemination of the truth, and that we do not have. The opinions of the courts are not usually printed in the newspapers or in the magazines. The irresponsible papers and magazines and the campaign orators, and even some candidates for judicial office, misquote and pervert them. The result is that the judge, who after all is said and done is usually an honest, hard-working and upright man, who usually hesitates at assuming rather than seeks to assume power, and who only assumes it out of respect for his duty and his oath "to support the constitution," is looked upon as an arbitrary despot. A cynic recently remarked that "out of every one hundred men, five think, the rest are orators."

Among the most persistent and aggressive of

the enemies of the life-term judiciary are the socialists and the members of the American labor unions. The courts have stood for the established law, an orderly progress and evolution, and an established social order, while the socialist's desire is disestablishment. The hostility of the labor unions and their growing interest in the personnel of the courts is modern in its origin and is the result of a logical growth. The doctrine that in a democracy such as ours every wrong could be righted at the polls and that where this remedy existed there was no excuse for anarchy and no justification for a resort to violence, for a long time had been taught in America and for a long time had served as a check to violence and insurrection. Like many other doctrines of its kind, however, it at first meant nothing in so far as the labor movement was concerned, and it could be safely urged by those even who were most inimical to the interests of the American working-man.

Until quite recently the great conservative farmer class has everywhere controlled our elections. This body of small employers of labor has, except perhaps with reference to the matter of railroad ownership and control, been a body of confirmed individualists. The immediate interests of its members have lain in small wages

and in long hours of toil. Its habit has always been to exaggerate the purchasing value of the wages paid in cities. It has known nothing of the injurious effects of the routine and mechanical toil incidental to the factory and railroad employments and to labor in the mines. It has, therefore, never looked with favor on the demands of the city laboring-man nor of the wage-earner generally, and it has been bitterly opposed to all unions and combinations, whether of capital or of labor. Since the growth of our large cities, however, and the organization of the armies of working-men who are now centered in the mining districts and who labor upon the railroads, a change has come. The farmer no longer everywhere possesses the balance of power. The Chicago delegation in the state of Illinois and the delegations from the manufacturing centers of the state of New York have for some time possessed a controlling influence not merely in the state legislatures, but in the national conventions, and the members of these delegations have found it necessary to consider, and even to pander to, the labor vote within their several districts if, indeed, they cared to retain their seats at all.

The immediate result of this change and this recognition of the strength of the labor vote was

the passage in every state of the Union and in the national Congress itself of a number of statutes which limited the hours of labor in factories and in mines, which forbade the payment of wages in commodities or by means of orders on companies' stores, which regulated the method of weighing and screening coal where the wages paid were dependent upon the amount of coal mined, which forbade the refusal of work to men or the discharge of men because of their membership in labor unions, and which sought to determine by legislative enactment, and in favor of the working-man, the main questions in controversy in the great and ever-present conflict between organized capital and organized labor.

These statutes were vigorously championed by the labor unions and were the result of their newly aroused belief in the value of the ballot and of their realization of their strength and political power. They were, however, with but few exceptions at first set aside by the courts as an unnecessary and unconstitutional interference with individual liberty and the individual right to property. The appeal to the ballot, so long looked upon as a laboring-man's heritage, was found to be an illusion. The laboring-man had found it possible to secure the legislation he desired, but

only to discover an impassable barrier to the fruition of his desires in the conservatism and individualism of the judiciary.[2] He also saw the judiciary yielding more and more to the demands of the mercantile interests and of the professional classes, and, by the writ of injunction and proceedings for contempt of court, taking from him the weapon furnished by the strike and the boycott and in some cases going so far even as to declare peaceful picketing a criminal conspiracy and the closed shop unlawful.

The consequence was a distrust on the part of organized labor of the American judiciary and a determination to control it. There is now everywhere apparent a determination to use the power of the ballot as a weapon against "the unfair judge" as well as against "the unfair" legislator. A bitter and relentless opposition is now to be found to the idea of a life-term judiciary.

In its criticisms of the judiciary, as now constituted, and of the rules and decisions above referred to, organized labor does not perhaps always impute corruption, but it constantly asserts that in the courts of law the laboring-man and

[2] The more recent decisions have been much more liberal in their attitude towards labor and towards the regulation of industry.

the labor union have no standing; that no matter what the working-man may do, the courts will decide against him; no matter what statutes may be passed in his favor, the judges will declare them invalid. It frequently declares that the fourteenth amendment to the Federal Constitution, which was adopted for the purpose of guaranteeing freedom to the negro, has been so construed by the courts as to enslave free labor; that the anti-pooling and anti-trust measures, which were passed to control capital, have been so construed as to control men. It argues that the judge, even though not so when elected, soon becomes far removed from the common people; that he takes up his residence in an exclusive district; that his wife and children move in an exclusive society; that he has, as a rule, been a corporation lawyer before his elevation to the bench, especially if in the first place he has been appointed and not elected; that he knows but little of, and consequently comes to care but little for, the upward struggle of the great masses of men. It argues that the longer and more stable his term of office, the more aristocratic will the judge become. It lays down the cardinal principle and doctrine that in a democracy such as ours, in which the judge can set aside legislative enactments and determine

great social, governmental and industrial policies, he should understand, sympathize with, and be responsive to the great social and industrial movements and ideals of the day, and should above all be made to feel that he owes his position to the ballots of the people.

The issue was forced by no less a person than Mr. Justice Brewer of the Supreme Court of the United States when in an address before the New York Bar Association he said:

"There are to-day ten thousand millions of dollars invested in railroad property, whose owners in this country number less than two million persons. Can it be that whether this immense sum shall earn a dollar or bring the slightest recompense to those who have invested perhaps their all in that business and are thus aiding in the development of the country, depends wholly upon the whim and greed of the great majority of sixty millions who do not own a dollar! I say that so long as constitutional guarantees lift on American soil their buttresses and bulwarks against wrong, and so long as the American judiciary breathes the free air of courage it cannot. . . . What then is to be done? My reply is, strengthen the judicary. How? Permanent tenure of office accomplishes this. . . . Judges are but human. If one must soon go before the

people for reëlection, how loath to rule squarely against public sentiment. . . . To stay the wave of popular feeling, to restrain the greedy hand of the many from filching from the few that which they have honestly acquired, and to protect in every man's possession and enjoyment be he rich or poor, that which he has, demands a tribunal as strong as is consistent with the freedom of human action, and as free from all influences and suggestions, other than are compassed in the thought of justice, as can be created out of the infirmities of human nature. . . . The black flag of anarchism flaunting destruction to property, and therefore relapse of society to barbarism; the red flag of socialism inviting a redistribution of property, which in order to secure the vaunted equality must be repeated again and again, at constantly decreasing intervals, and that colorless piece of baby cloth which suggests that the state take all property and direct all the work and life for individuals, as if they were little children, may seem to fill the air with flutter. But as against these schemes or any other plot or vagary of fiend, fool or fanatic, the eager and earnest cry and protest of the Anglo-Saxon is for individual freedom and absolute protection of all his rights of person and property. . . . And to help strengthen that good time we shall see in every state an independent judiciary, made as independent of all outside

influences as possible, and to that end given a permanent tenure of office and unchangeable salary."

To this answer and defiance the unions were not slow to demur, and it is more than a coincidence that almost contemporaneously with the delivery of the address to which we have referred Mr. William Jennings Bryan began his agitation for an elective federal judiciary, and the labor unions of Chicago entered the political arena for the avowed purpose of removing from the bench those judges whose decisions and actions appeared inimical to their interests. It was not long afterwards that Mr. Samuel Gompers and the American Federation of Labor entered actively into the field of national politics and openly sought, not merely to dictate legislation, but to control the appointment of the federal judiciary itself. It is a noticeable fact also that in the recent agrarian or so-called Non-partisan movement in North Dakota and in the Northwest, the control of the judiciary has been a cardinal principle.

The balance of power in this great struggle, however, and the controlling vote, belong neither to capital nor to organized labor, but to the so-called middle class. The members of this class

are swayed by many conflicting interests and considerations. They have no general sympathy for organized labor nor for its grievances. The idea of a permanent judiciary appeals to them. They criticize the jury system, especially in criminal cases. They frequently refer with approval to the ease with which convictions are obtained in the federal and in the English courts where the judge is such an important factor. But they are nevertheless almost as skeptical concerning the courts as is organized labor. They are constantly thinking of the monopoly and of the trust; and the social power of the trust magnate over the judge is as much feared by them as is the social power of the employing classes by the laboring-man. When Mr. Thomas Lawson in one of his articles included in a list of precepts supposed by him to guide the conduct of the Standard Oil Company, that one "never forgot that our legal department is paid by the year and our land is full of courts and judges," he voiced a sentiment which unfortunately is only too prevalent.

Unfortunately, English precedents are of but little value to us. The English judge interprets no constitution. He merely construes and applies the statutes. In England Parliament is a legislative body and a constitutional convention in one,

and its mandates are final. The English Parliament controls the English courts, and not the English courts the English Parliament. If it were true in America as it is in England, that our judges did not have imposed upon them, or had not assumed to themselves, the decision of all of our great political questions and economic and industrial policies, the case would be very different. As long, however, as the contrary is the case, that is to say, as long as our written constitutions are looked upon as the fundamental law of the land, and their interpretation is entrusted to our judiciary, the judicial office must of necessity be more or less political, and permanence of tenure and appointment as opposed to election will be vigorously assailed by a large portion of the American people. Longer terms of office and larger salaries will no doubt be conceded in the several states, but life-term state judiciaries will, it is believed, be acquiesced in only when, by constitutional amendments, the judges are deprived of the power to exercise, or, by their own volition, cease to exercise the political and legislative powers which they assume to-day, and when they discard the use of the writ of injunction in labor cases. These prerogatives, however, should never be surrendered or be taken away. On our

constitutional system the stability of our institutions and the maintenance of our democracy depend. It is it which gives the opportunity for the sober second thought of which every democracy is much in need. The writ of injunction is the preventive medicine of the law. Surely we are not compelled to stand idly by and see our property demolished and our institutions destroyed. Have not the World War and the failure of Germany to make reparation shown us that an ounce of prevention is worth a pound of cure? Surely it is sometimes wise to prevent the horse from getting out of the barn. Much discretion is necessary in the exercise of the power to issue the writ of injunction, but the power should certainly be recognized.

Strenuous, and more or less successful efforts have been made by the American bar associations to defeat the suggestion for the recall of judges and of judicial decisions, yet perhaps a modified recall can be used as a method of compromise. On account of our short terms of office and especially under our primary election systems, our judges are always, as a matter of fact, confronted with a periodical form of this intimidation, as it is usually the disgruntled litigant who promotes the hostile campaigns. The chief

danger in the primaries, and the chief danger in the recall procedure which generally has been adopted, lie in the fact that the sitting judge has not merely to defend his record but to contend against the popularity and often the political sharp practices of numerous aspiring candidates. Though designed to promote democracy the recall is hardly the weapon of the poor man, since it takes money to start and to circulate a petition and to finance a campaign. It is a weapon, however, which can be used easily by the rich and by the moneyed interests, and just as our fathers feared that the independence of the judiciary would be destroyed by the power of removal which was possessed by the king, so have we reason to fear the power which is granted to vested wealth by the supposedly democratic and certainly popular weapon of the recall.

It is perfectly clear, indeed, that only a rich judge can afford the expense of frequent elections, and all that an offended litigant has to do to wear out any judge is to circulate numerous petitions and to induce some popular candidate to run against the offender. A recall, as now provided for, is both a recall and an election. The new candidate can start with a new record, or, what is often still better, no record at all—better be-

cause no one can accomplish anything in this world without making enemies. The sitting judge, however, must have decided every lawsuit against one of the litigants, and must have made many enemies. Even though the charges which are made against him may be entirely false, every such charge must result in the loss of at least some votes, for falsehood travels faster than truth. Few of us, indeed, realize the cost and the impossibility of everywhere refuting political falsehoods. In a state with a voting population of one hundred thousand it would cost nearly five thousand dollars to write and to mail but one letter to each voter. It costs money to insert political advertising in the newspapers, and paid self-serving political advertising usually is of but little value. In any event, should judges spend money for campaign purposes? And, if they should, can their meager salaries afford it? If they have not money of their own they must obtain it somewhere else. They must themselves organize campaigns or have campaigns organized for them. The recall of a judge is not a party affair. In the case of a primary election also there is no political party whose credit is at stake, and every candidate is working for himself. Who shall the judge get to finance him? Who shall he get to

manage his campaign? Can a judge ask such favors of business men or corporations or even of lawyers who at any time and at any moment may bring cases before him to decide?

One thing is certain, and that is, that a judge should not be compelled to fight two battles in one and both to defend his record and to oppose the political efforts of an aspiring candidate. It would seem to be equally clear that a judge should be removed only in case of dishonesty or of incompetency. Is not the suggestion of the Cleveland Survey of Criminal Justice well worthy of consideration which is summarized by Mr. Raymond Moley in the following language:

"The survey does not go so far as to recommend the abolition of the present elective system of judges, but recommends a great change in the method now in practice. It is deemed by the survey impossible, with the present state of public opinion, to adopt the appointive system of selecting judges. However, it is probable that many of the present evils can be eliminated by providing more protection for a judge already on the bench. Therefore, the survey recommends that judges should be elected for a first term of six years, at the end of which they should run for reëlection for a longer term, and that in each

successive campaign for reëlection, they should run against their own record and not against a group of other candidates. Thus the question to be decided when a judge completes his term of office is, 'Shall he be retired or shall he be retained?' In the event of the retirement of a judge, a special election in which he would not be a candidate would be held."

This method would secure the holding of the judicial office during good behavior and would meet the demand for a popular control by vesting the determination of that behavior in the electorate instead of in the upper house of the state legislature. It would be a popular vote of confidence or lack of confidence. It would do much to save honest and conscientious but politically helpless or politically unsophisticated judges from being defeated and removed, not because of dishonesty or incompetency, but because of the popularity or political shrewdness of their opponents.

CHAPTER VIII

THE COURTS AND THE LEGAL PROFESSION

SINCE popular elections we must have, the solution of the problem lies with the law school, the bar association and the lawyer.

Already a very large per cent of the candidates for admission to the bar are the graduates of our law schools; and the bench and the bar of the nation will in the future be such as the law schools shall choose to make them. With the exception in some states of justices of the peace and probate judges, no man can be a judge unless he is a lawyer; and if the members of the legal profession, which the law schools dominate, will stand behind the honest and the competent judges and frown upon and ostracize, on or off the bench, those who seek to gain office by misrepresentation or fraud, they can in this way control the elections. As long, however, as the spirit, or rather lack of spirit, of the profession is such that it will allow its members to resort to dishonest practices or will allow men to become candidates for the

judicial office whose only qualification is that they "can shout long and loudly at the hustings," so long will the office of judge, and with it the legal profession itself, be in disrepute. Though the president of Yale University was once ridiculed for suggesting the cure of ostracism for the crime of predatory commercialism, the suggestion was none the less wise and none the less practical, and can well be applied to the judicial office.

The members of the bar must not allow the modern system of primary elections, which was instituted for the purpose of promoting democracy, to destroy democracy. They must not stand idly by and allow the demagogues or the moral weaklings in their order to be elected to judicial office by appealing to the popular ignorance and the popular prejudices and by campaigns of misrepresentation and of falsehood. No officer in the army would dare to seek preferment by these means; he might gain that preferment—but he would be ostracized by his fellows. The same professional spirit should prevail among the members of the bar from whose ranks all judges are of necessity chosen and to whose ranks so many judges later return.

No self-respecting judicial aspirant can "gumshoe" for election, nor can the incumbent of a

judicial office ask men and factions to support him who may later have cases in his court for decision. His function is not to count noses, to keep his ear to the ground and to decide as the majority wishes or as those who are in political power desire, but to maintain the established law and to do justice among men. We must make it possible for the judge to be respectable and to be really respected, and we must insist that there shall be a government of law. A life-term judiciary was insisted upon in England, and the clause which guaranteed it was inserted in the Bill of Rights, in order that the judges might be freed from the fear of the royal displeasure.[1] We will do well to remember that in a democracy there can also be a government by intimidation, and that, if we have weaklings on the bench, the fear of removal by a popular vote may be as disastrous to even-handed justice and to the stability of our institutions as the fear of the anger of the king. When, as was recently the case in North Dakota, political factions openly brag that their candidates for judgeships are pledged to the support of their measures, and their political leaders and newspapers assert

[1] "He has made judges dependent upon his will alone, for the tenure of their offices and the amount of the payment of their salaries."—Declaration of Independence.

that for this reason the election of these candidates is more necessary than that of even the governor himself, then the lawyer should stop and think and the lawyer should be heard.

No reputable law school will graduate a student who, in addition to his legal education, has not a general culture which is evidenced by a high-school diploma or its equivalent, and many schools require a two-year or even a four-year college course as a prerequisite to their law degree; yet the states of the union can be counted on one's fingers which require such prerequisites to the admission to the bar. There are always men in the legislatures who have relatives and friends whom they desire to have admitted by the shortest route, and there are always practicing lawyers who, after many years of education at the expense of their defeated and misadvised clients, have learned a quotum of the law without the preliminary training and who quote Lincoln as an illustration and block all progress. They do not state that the law and society is much more complex to-day than it was in the days of Lincoln; that public schools and high schools and universities are now everywhere open and maintained at the public expense, and that Lincoln himself always regretted his meager education and generously envied and ad-

mired Stanton and his other college-trained antagonists, whom even he could only successfully combat because he himself was one of the rarest of men.

The standards of admission to the bar cannot be too high, and we need something more than legal knowledge. We need to inculcate honor and we need to teach responsibility. In this rapidly evolving age, when we are questioning the very foundations of government, we need lawyers and judges who have read something more than the law books; we need men who are trained in history and economics and sociology and who know something, not merely of the sciences and of the present-day statutes, but of the history of the race and of the struggles through which it has passed. We have a crowded bar and there are men in the ranks who will do almost anything for bread and butter. We have the ambulance chaser, and the morally and the intellectually incompetent. We have great firms whose leading men bid for trade and whose work is done by clerks and underlings. We have lawyers of great talent and attainment, who are merely hired men. Technically they are officers of the court but practically they are employed on a salary by great corporations and often feel that they must do what the

corporations dictate. A man cannot serve two masters. This is as true to-day as in Biblical times. In medieval France and Spain the lawyer was a nobleman, and this because he was expected to be noble and because the public nature of his calling demanded it. Formerly the client went to the lawyer; now only too often the lawyer goes to the client. In many instances the lawyer is merely an employee. We must restore the practice of the law to its place as a profession; we must give our lawyers a broad sense of their social responsibility; we must make them really democratic and really loyal to the democratic trust.[2]

[2] The oath which was administered to the English Serjeant-at-law was as follows:

"Ye shall swear, That well and truly ye shall serve the King's People, as one of his Serjeants-at-Law, And ye shall truly counsel them that ye shall be retained with, after your cunning, and ye shall not defer, protract, nor delay their causes willingly for covetousness of money, or other thing that may turn you to profit, and ye shall give due attendance according. As God you help, and his Saints."

An address of Lord Commissioner Whitelock to the new serjeants-at-law on November 18, 1648, contains the following admonition:

"For your duty to particular clients you may consider, that some are rich, yet with such there must be no endeavor to lengthen causes, to continue fees. Some are poor, yet their business must not be neglected if their cause be honest; they are not the worst clients, though they fill not your purses they will fill the ears of God with prayers for you, and he who is the defender of the poor will repay your charity. Some clients are of mean capacity; you must take more pains to instruct

The importance, in both civil and criminal cases, of honest and public-spirited and thoroughly edu-

yourself to understand their business. Some are of quick capacity and confidence, yet you must not trust to their information. Some are peaceable, detain them not, but send them home the sooner. Some are contentious, advise them to reconcilement with their adversary. Amongst your clients and all others, endeavor to gain and preserve that estimation and respect which is due to your degree, and to a just, honest, and discreet person. Among your neighbours in the country, never foment but pacify contentions."

"From the fourteenth century the bar of France constituted an order of nobility, and was fully recognized as such. The advocates who attended the Court of Parliament were spoken of as an order, a name which they retained until the revolution of 1789. Before any one was admitted as a member, or allowed to enroll his name upon the list, or tableau, which was kept by the parliament, he was formally presented by some advocate of long standing, and obliged to take an oath of advocacy, his competency being established by previous examination. After the presentation, he entered upon a novitiate of several years of study and attendance on the courts before his name was actually inscribed as an advocate. He was subject to certain rules and prohibitions; and Mr. Forsyth has collected them, as he informs us in a note, from a venerable work, written in 1360, called 'Le Grand Coutumier General de Pratique Civil et Canon,' by Jean Bouteiller, Conseiller en la Cour de Parlement. Among other prohibitions he gives us the following: (1) He was not to undertake just and unjust causes alike, without distinction; nor maintain such as he undertook, with trickery, fallacies, and misquotations of authorities. (2) He was not, in his arguments, to indulge in abuse of the opposite party, or his counsel. (3) He was not to compromise the interests of his clients, by absence from court when the cause in which he was retained was called. (4) He was not to violate the respect due to the court, by improper expressions, or unbecoming gestures. (5) He was not to exhibit a sordid avidity of gain, by putting too high a price upon his services. (6) He was not to make any bargain with his client for a share in the fruits of the judgment he might recover. (7) He was not to lead a dissipated life, or one contrary to the gravity and modesty of his calling. (8) He was not, under pain of being disbarred, to refuse his services to the indigent and oppressed."—Weeks on Attorneys (2d ed.), p. 12.

"After the Revolution, and in 1804, Napoleon decreed the

cated counsel, who will do their duty no matter how small the amount of money involved or how

reëstablishment of the order of advocates 'as one of the means most proper to maintain the probity, delicacy, disinterestedness, desire of conciliation, love of truth and justice, and enlightened zeal for the weak and the oppressed, which are the essential foundations of their profession.' In 1810, he issued an imperial ordinance containing a number of rules, for the purpose of regulating 'that salutary discipline of which advocates showed themselves such zealous guardians in the palmy days of the bar.' Among the rights and duties thus prescribed were the following: 'We expressly forbid advocates to add their signatures to opinions, pleadings, or writings which are not their own, or which they have not duly considered. We likewise forbid them to make any bargains for their fees, or to compel their clients to recompense them before the conclusion of a case, under the penalty of a reprimand for the first offense, and expulsion from the bar, in case it is repeated. Advocates shall have free scope for the exercise of their office, in the defense of justice and of truth; at the same time, it is our wish that they should abstain from all inventions in their facts, and from other evil practices, as well as from all useless or superfluous speeches. We forbid them to indulge in any injurious or offensive personalities against parties to whom they are opposed, or their counsel; to assert any fact seriously affecting the honor or reputation of the opposite party, unless the necessity of the case requires it, and they have express written instructions to that effect from their clients, or the attorneys of the latter."—Weeks on Attorneys (2d ed.), p. 12.

In Germany the lawyer swears obedience to the constitution and the laws, and that he will faithfully and industriously aid everybody, the poor man quite as willingly as the rich man—without fear of the courts—to his right, by advice, speech and action; that he will not overcharge parties with fees; not obstruct the amicable settlement of law suits, but further it as much as possible; not retard or hinder justice in any way whatsoever; never give countenance to dishonest designs of parties, particularly not suggest to any party or any accused person groundless subterfuges and statements contrary to the truth, or recantation; and if he should find the cause of a party to be without foundation, or not based upon the law, and

much their individual reputations are at stake, cannot be too often emphasized. We seldom realize how the lack of such men embarrasses the judge. The duty of the attorney is not merely to his client. He is an officer of the court. His province is not merely to advocate the cause of his client but to assist the much-burdened judiciary. If an able and conscientious lawyer will honestly

he could not amicably dissuade such party, as is his duty to do, from its intent, that he will not represent it in court in such cause any longer; that he will never, in any case taken in hand by him, speak and act more than he is instructed to do; that he will keep secrets intrusted to him inviolate; take care of, and return in good time, public papers and records laid before or communicated to him; keep safely funds which may be intrusted to him, and give a conscientious account of them; and, finally, show to the public authorities and courts, before which he appears as counsel, due respect, and abstain from all invective against the same; also that he will not be prevented from the fulfillment of these duties either by favor, gifts, friendship or enmity, or any other impure motive, and that he will altogether so behave as is becoming and befitting a conscientious and duteous attorney and counselor at law.

"In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men."—Preamble to American Bar Association's Code of Professional Ethics.

seek out and present all of the facts and all of the law on his side of the case, a fair measure of justice can be done by an impartial court. If this is not done, the court must itself investigate from the beginning and often justice will not be done. How much time, may we ask, has the Supreme Court of the United States, with its five hundred and more opinions to write every year, to give to original investigation? Too often, however, counsel are utterly ignorant of their cases and give to the courts no aid whatever. Not long since a case was argued in the supreme court of a western state in which the only point at issue was the legal consequence of the failure of the sheriff to attach his signature to a certain document or writ. The case was argued by counsel on both sides of the case on the theory that there was no such signature, and much law was cited. The court met in banc, discussed the case, came to a tentative decision and a judge was assigned the duty of writing the opinion. He did so, and in it held that the failure of the signature rendered the proceedings invalid. The remaining judges then concurred in the opinion and decision. Just before the court was to meet, however, and the decision was to be publicly announced, the judge decided himself to examine the original record and the origi-

nal papers, and much to his surprise discovered that, after all, the signature had been attached. All he had to do of course was to call back his opinion and to reaffirm the holding of the court below, but after an enormous waste of time and energy and the expense of the appeal, all of which might have been saved if the lawyers had done but half of their duty.

We hear much of the reform of the law and of the law's delays, but after all the reform of the law is in the reform of the lawyer. A shyster can bring about injustice and delay under any code. Given an honest and well-trained lawyer on each side of the table in any courtroom and litigation can be greatly simplified, actual technicalities can be swept aside, concessions can be made, and much of the time and the cost of litigation can be saved. Given, however, a shyster on one side, even though there be an honest man on the other, and the result is very different. It is also apparent that every righteous lawsuit that is lost through the carelessness or incompetence of counsel makes an anarchist of the defeated litigant.

The greater part of the delay and the expense of litigation could be saved if the lawyers remembered that after all they were officers of the court and agents in the administration of justice rather

than hired gladiators, and that their duties to the public and to the courts were greater and higher than their duties to their clients. In nearly every case they could stipulate in advance as to the greater part of the evidence. They could save days and days of taking testimony and thousands of pages of typewriting and printing with its attendant expense. If they sought the truth and were only anxious that the truth should prevail, there would be few disputed questions either of law or of fact.

The root of the trouble, however, lies with the people themselves. The attitude of the public towards the lawyer and towards the administration of the law is entirely wrong. It wants and expects the lawyer to be a gladiator. It wants him to contest every point. The greatest difficulties of the conscientious lawyer are those which are encountered in trying to restrain the hatred and cupidity of his own clients. The need of the day is for the bar to be once more put on the plane of a profession in which there is the same sense of public responsibility and the same sense of honor that there is among the officers of the army or of the navy. Its members must steadfastly refuse to be gladiators and hirelings. The public should be made to understand the real importance

and the governmental value of the American judge. They should be led to realize that the lawyer of to-day is but the judge of to-morrow, and that every practicing lawyer is an officer of and an adviser of the courts and that he has an important public and governmental function to perform.

CHAPTER IX

THE MISINFORMED ENTHUSIAST AND THE COURTS

MUCH harm has been done by the ill-advised utterances of the social enthusiasts and by the men of lofty motives who have no conception of the necessity and the limitations of a reign of law. These persons always desire to stampede popular thought. Always they desire a short cut to the attainment of their particular ends. They believe in constitutional restraints, but only in so far as their particular interests are concerned. Their conception of liberty is the conception of the leader of the Shays' Rebellion, who said: "My boys, you are going to fight for liberty. If you wish to know what liberty is, I will tell you. It is for every man to do what he pleases, to make other folks do as you please to have them, and to keep folks from serving the devil." They lack an understanding of our institutions, of the democratic value of a written constitution and above all of a government of law as opposed to a government of men.

The method of thought and the criticisms of these well meaning but legally uneducated enthusiasts are well illustrated by the popular comments on the recent federal child-labor decisions. Perhaps the most brilliant but at the same time the most unfair and insidious of these comments was the poem entitled "Unconstitutional," which read:

Five reverend, wise and gentle men
Have thrust the babies back again
Into the prison walls.
These hold the future of the race,
Yet grave men look them in the face,
And droll of ancient scrawls.

Five men of gowns and high degree
Like five old crones across their tea,
Have worked these worthy ends,
And from the confines of the grave
Have summoned moldered hands to save
The children from their friends.

Not what is right, or what is just
But what divinings from the dust
Aye, what was the intent
Of men whose widest, wildest dream
Conceived not rail, nor mill, nor steam
Yet wrote the Document.

Fain would we leave it to those men
Could they but come to life again,
With brains alert, alive,
Who, even yet are scarce more dead
Than are the housings in the head
Of these—our reverend Five.

This poem was seductive because it appealed to the sentiment of humanity. It was exceedingly clever, but it was unjust. It ignored the fact that in the instant case the Supreme Court was called to pass upon one question, and one question alone, and that was the power of the federal government. It was not a question of ethics or humanity or sociology, but of delegated power. It was whether the delegation of the power to regulate interstate commerce, which was given to the central government by the several states so that commerce might be free, could be used by that government so as to control the domestic policies of the commonwealth which had delegated it.

This attack, however, was but one of many, and contained the reasoning of scores of newspaper editorials. Carried away by sentiment and the only too prevalent tendency of the times to condemn the actions of all who are in authority, the authors of these articles and poems failed to realize, or at any rate to state, that the construc-

tion of the interstate commerce power, which was sought for by the advocates of the Child Labor Act, would have had to be followed in other cases and in those in which children were not concerned. If on account of its solicitude for the welfare of the children, the Supreme Court had been induced to hold that the Congress, under its interstate commerce powers, could deny transportation on interstate lines to the products of factories where children were employed at an age, or for hours, not approved by it, the court would be compelled to make the same holding in other cases and to hold that the Congress by this means could absolutely control the domestic policies and the industries of the several states.

The federal act placed the limit of employment at fourteen years of age. It might have placed it at sixteen, eighteen or twenty and have refused the use of the interstate commerce lines of transportation to all factories that failed to comply with the requirement, even though the several states of the union which approved of anti-child labor laws differed largely in their estimates as to the proper age limit. By the same power, if it had been a power, a northern majority, before the Civil War, might have debarred from interstate commerce all goods made of cotton or by slave

labor, and a southern majority might have debarred all goods which were made of wool. The owners and manufacturers of carriages, if they had had the majority, might in the earlier days have prohibited the carriage of automobiles. A majority in Congress might to-day side with and make peace with the labor unions of the country and prohibit the carriage upon interstate lines of all products not bearing union labor stamps or not made in union shops and manufactories.

The critics have allowed sentiment to control and have forgotten what goes to make up a stable government. They have failed to remember that the delegation to the federal government of the interstate commerce powers was merely for the purpose of protecting the industries of the country as a whole and of making it impossible for the border states to levy protective tariffs against those in the interior and thus to monopolize the ports of entry. They have failed to realize that the main purpose was that commerce might be free and not that it should be restricted.

Similar criticisms have been made and similar errors have been committed in relation to the still more recent decision which has declared invalid a confiscatory federal tax upon the products of child labor and by which Congress sought to

do indirectly that which it could not do directly and to tax out of existence that which it could not prohibit. The justices of the Supreme Court of the United States, however, are not and never have been the enemies of the American child nor have they been the enemies of labor. With the one exception of the case of Lochner *v.* New York, which they have since practically repudiated, they have upheld every law which has regulated the hours of labor and which has been brought before them; and, although these statutes have applied merely to adults and as yet no state child labor case has been subjected to their scrutiny, there can be no question of their attitude if such an event ever occurred. They have merely asserted the self-evident fact that the framers of the Federal Constitution never intended to abolish the states and vest all powers of government in the federal Congress, and that though the tendency of to-day is undoubtedly in that direction, this revolution, if effected at all, should be effected by the people themselves, after a sober second thought and by means of a constitutional amendment, rather than by judicial legislation. They also wisely held that, though the power to tax may often involve destruction, it cannot be legally used for that purpose alone;

and that the power should be exercised by the federal Congress for the purpose of raising revenue and not for the purpose of determining and controlling the domestic policies of the several states. It must indeed be evident to all persons that if the federal Congress may tax out of existence child labor or the products of child labor, it may tax out of existence any other article, practice, or thing. It may tax out of existence all articles not carrying the union label. What it may do for good motives it may do for those which are selfish and bad. It is argued, of course, that the states of the North and the manufactures of the North should not be subject to the competition of the child labor of the South. There is no doubt that they should not be, but the question at issue is whether under our present constitution the federal Congress has any power to control such things. Could it for instance protect the fruit-growers of Michigan by imposing a tax on those of California?

Ours is a government of laws and not of men, and the members of our supreme courts are compelled to announce and to decide not what they desire but that which the law and the constitutions have authorized. If for good motives and for good purposes and out of a superabundance

of sympathy, they may announce that to be the law which is not the law and may ignore all precedents and all logic, they may do the same thing from evil motives or for the sake of being reëlected.

Too many of the critics desire our judges to be cowards and time-servers and not the courageous servants of an impartial law. They want them to count noses and to decide with the temporary majority. They want them to be Prussian Kaisers and to say that, in the presence of a military or political exigency or of personal friendship, there are no constitutions and that there is no established law. They want them to be representatives and not judges.

A treaty is merely a contract, and international law is a charter or constitution among nations, and there is no difference between violating a treaty and violating a constitution or the mandates of the established law. We fought in Europe for the supremacy of international law. We fought for a government of law among nations, and not a government of the heaviest battalions; and it matters little whether these battalions are armed men or temporary political majorities. We must fight for the same thing in America, and we must not let the mass rush of

political levies abolish free government among us. If our courts yield to the pressure; if they are always thinking of the hustings; if the fear of the primary election is ever before them; if lawyers are allowed to threaten that, if they are defeated, they will air the matter in the public press and at the polls; if candidates for judicial offices are permitted to go before political conventions and to promise that, if they are nominated and elected, they will sustain as constitutional all of the measures of which the conventions may approve; if judicial campaigns are based upon the proposition that certain candidates must be elected in order that a political program may be carried out and sustained,—then and at that moment free government and a government by law will have vanished from America.[1]

Legal education should be more general. The proper education of our judges, and of our lawyers is a matter of state concern, and one in which a state can be well engaged. There can be no doubt that competent and high-minded lawyers create a respect for the law and for

[1] All this has been done recently in North Dakota and has been justified under the theory that a judge, like a member of Congress, is the representative of the temporary majority rather than the impartial enforcer of an established law.

government, and in this way perform a great governmental service; that the more of ability and honesty there is in both the bench and the bar, the less of anarchy there will be; that under our peculiar American system, where every law must bear the test of the constitutions, and the courts alone apply that test, the lawyer and the judge are of all public servants those in whose training the public should take the greatest interest. But is the training of practicing lawyers the only or indeed the main function of the law school? Must the law school be merely a "Lawyer Incubator?"

It is well to remember that Sir William Blackstone wrote his famous commentaries for the gentlemen of England rather than for the lawyers of England. He realized that it was this class in his time that filled the public offices, sat in Parliament, officered the army and the navy, and generally controlled the policies of the nation, and that it was above all necessary that this governing class should be acquainted with the law and with the history and the traditions of the country which they sought to govern. It is well for us to remember that here in the America of to-day we have given the ballot to everyone; that in some states we have the initiative, the

referendum, and the recall; that the majority is all powerful; that everyone can vote on constitutional questions; that anyone can be elected to public office; and that whether we shall have liberty and the right to private property at all, is after all for the majority to decide.

The history of Mexico, of Russia, and of the South American states should by this time have taught us that the problem of government is the most important of all problems, and that natural wealth in itself means nothing. Mexico is almost as rich in natural resources as is the United States, yet who of us would live in Mexico?

Before the World War Russia owned one eighth of the land surface of the globe, yet who would live in Russia? It has been our democratic, but at the same time individualistic and self-respecting, comradeship which has made America possible, and above all, the fact that we alone of the world's great cosmopolitan republics have really grasped the magnificent concept of a democratic government but yet a government which at all times shall be subject to an established law.

We are to-day in the midst of a social and economic revolution, and to-day perhaps as never before we are questioning the very foundations

of government. Only yesterday a national strike was seriously threatened because a dynamiter was not set at liberty; only yesterday a strike was called which not only would have subjected a nation to the horrors of the cold of winter, but would have stopped the wheels of every industry in the land. Everywhere the right to the injunction is denied, and everywhere bodies of men parade the streets and throng the courtrooms so that the judge may be intimidated. Every day corporate wealth is stacking the cards for the defeat of judges whose decisions have been inimical to its interests. At every primary election honorable judges are defeated because they have dared to keep their oaths of office and to assert the established law as against the law of the mob, the temporary majority, or the well organized but disciplined and militant minority.

As a matter of last resort all government is founded upon force. Unless, as a matter of last resort, the people as a whole will stand back of and, if necessary, fight for the enforcement of their court decrees and judgments, those decrees and judgments are mere scraps of paper, and government by law has ceased to exist among us. Yet in order that those decrees shall be enforced it is absolutely necessary that the courts shall be

respected, that the administration of the law shall be respected, and that men shall generally believe in, and realize the value and necessity of, a government by law and not by temporary majorities or by the passions of men.

The public needs to be informed both as to the nature and the scope and the limitations of the law. We should have university extension courses in constitutional, administrative and criminal law as well as in bookkeeping and in literature. Because we provide for courses in civics in our public schools and stage flag-day exercises, we think we have laid the foundation for a self-governing people. We forget that these courses are usually taught by immature girls, who know nothing of law and nothing of the problems of government. We forget that these girls are only teaching children. In fact, we teach the children that which they cannot understand. We teach the adult voter little or nothing. We have left the education of that voter almost entirely to the socialist and to the anarchist.

We have undertaken to build a new nation from a raw material of many peoples drawn from every country and every clime, speaking every tongue, inheriting every prejudice and professing every religion. Such a nation can be bound to-

gether by law, and by law alone. Our very existence depends upon the training of an intelligent citizenship, by which law shall be understood and respected, and which shall be capable of making and enforcing wise laws. We have sneered altogether too much at the law and at those in authority. We have been unintelligent. Our unintelligent criticism has created a widespread disrespect for government. We have criticized and torn down. We have not builded.

In spite of our unconstructive criticisms we have been able to exist and to keep ourselves purged of anarchy because we have been largely a nation of property owners, and therefore conservative. The time has come, however, when the aid of the law will be more and more invoked. As the problem of existence grows more and more complex, and the industrial struggle grows keener and keener, men will begin to look more and more upon the government as a partner, or as a protector, and will rush to the legislatures for help. As this tendency increases, a greater degree of intelligence will be required of our legislatures and of our judges. As wealth concentrates in the hands of the few, as the discontented and radical classes grow larger and larger, the number of intelligent, thoughtful, law-know-

ing and law-loving men and women must also increase, or anarchy and discord will be the result. Our criticism of the law and of the judiciary must no longer be captious, or be based on a lack of knowledge. It must be conservative, constructive and intelligent. The members of our legislative bodies, those who make our statute law, should, as a general rule, be laymen, and should be chosen from the rank and file of the people, because they must and should be representatives; but they should know something of the great body of law already in existence, and of the legal principles already recognized, before they seek to remedy or to change.

There can be no doubt that as a community grows older, lawsuits become less dramatic, and jury trials less frequent, and that the demand for the trial lawyer decreases; but there is also no doubt that individual conduct and freedom comes to be more and more regulated by law, and that it becomes more and more necessary that a knowledge of basic legal principles shall be spread throughout the community. One isolated in the wilderness may do largely as he pleases, as his conduct affects no one else, but he who lives in a crowded community, among his fellows, must so use his own as not to injure the rights of others

and of the community as a whole, of which he is but a unit and a part. This principle is the very foundation-stone of all social intercourse, and of all free government. The principle is also well established, and necessarily established, that "ignorance of the law excuses no one." Although ignorance or mistake of a fact may sometimes be pleaded as a defense, or an excuse in a civil or in a criminal action, everyone is absolutely presumed to know the law.[2]

It seems to follow as an inevitable conclusion that somewhere in its educational system the state should furnish some means by which and some place in which this fundamental knowledge so necessary to good and effective citizenship and which all are absolutely presumed to possess, may be acquired; and that a state educational system which is lacking in this particular and in furnishing this opportunity is markedly defective.

The province of the law school, in short, is not nearly so much to furnish practicing lawyers as to train an intelligent citizenship. It should endeavor to furnish a knowledge of basic legal principles to any citizen who may desire to learn them. It should furnish a center where jurisprudence may be studied as a science, and whence sug-

[2] Sometimes the courts of equity make exceptions to this rule.

gestions may come which may tend to clarify the legal atmosphere to the same extent that the studies of the scientist in the laboratory tend to clarify that of the medical world.

From the nature of things, the practicing lawyer must be a partisan. The time of the judge is occupied in deciding individual controversies and in applying the law. There should be some men who shall study our legal system scientifically and thoroughly, the fruits of whose investigations may be used when codification or legal reform becomes necessary, and who themselves may be leaders in legal reform. If it is necessary that we shall maintain agricultural experiment stations and shall furnish institutions where the science of agriculture may be promoted and studied, it would also seem that we should furnish equal facilities for the study of government,—for law is merely applied political science, applied social ethics, applied civilization.

The time has come when it is no longer wise or safe to allow even the rank and file of our citizens to remain in ignorance of the great principles which bind us together and of the rules of conduct which control us, for it is they who create the public sentiment, which in every truly representative government the laws must and should

formulate. If any of us desire really to belong to the governing class we must seek to understand the principles which underlie our government, the present status of our legal thought and of our legislation, and the influences which affect our legislators and our judges. Our legislators, too, should themselves be legally intelligent. Too much of the legislation of the past has been dictated by the trained lawyers who, at the behest of the special interests, crowd our legislative halls, or by the demagogue.

This being the province of the law school, the distinction between the right to study law and the right to practice law should be clearly recognized. The right to study law should be practically within the reach of all. The right to practice should be only within the reach of those who are properly trained, and whose moral fitness is beyond question. Even the ex-convict should be allowed to pursue the study, provided that his present conduct is good, and that he does not contaminate those around him; for the state can hardly punish one for disobeying the law, and then refuse to instruct him in it when he desires instruction. One would hardly, however, advocate the admission of ex-convicts to the bar of any state.

A college education may well be required as

one of the prerequisites to admission to the bar. A state in which everyone is presumed to know the criminal law, and which has no educational requirements as a prerequisite to membership in its legislature, in its municipal councils, or in its other public offices, can hardly take the position that a citizen must be a college graduate before he can be allowed to study the great principles by which organized society has chosen to be governed and controlled. As a matter of fairness there should be afforded to its citizens some place in which they may learn not only what their rights, but what their duties are. It is often as important to know one's duties as an employer of labor, and as an owner of property, as to know the history of the morality play, or to be able to read Chaucer in the early English; to know one's right when upon a railroad train, as to know the story of the discovery of the use of steam, or of King Alfred and the pancakes; to know when a contract is or is not binding, as to know how to conjugate a Greek verb; to know when a judge exceeds his powers, when a corporation violates its charter, or a public officer his duties, as to know the solution of a problem in geometry or the plot of the latest novel.

The protest against technicality and the follow-

ing of precedent which, when these terms are properly understood, has much of merit in it, may, when distorted and in the hands of the demagogue, lead to anarchy. Incongruous though it may seem, the truisms that all law and all government spring from, and are of, the people, and that the courts are organized to administer justice, may be the instruments of the greatest harm. In its protest against technicalities the public has often failed to distinguish between the rules of orderly procedure which are necessary to every fair, deliberate and impartial trial, and the requirement of crossing a *t* or dotting an *i* which has long since been ignored by the courts. It is safe to say that in by far the greater number of the American courts there are to-day no rules of procedure and of evidence which are not the result of the experience of the ages and which that experience has not found necessary for the furtherance of justice. Certain it is that no modern appellate court reverses a judgment unless it is satisfied that a fundamental right has been violated. The critics are generally misinformed and they jump at conclusions. They notice the unusual rather than the usual, and this because the usual is neither sensational nor news, nor does it furnish material for a popular magazine article.

We have in fact commercialized our legal criticism, and many criticisms of the courts are written to sell and not to further the ends of jurisprudence or to promote the truth. The danger in America, indeed, is not that the courts will enforce the so-called technicalities too much, but that they will observe them too little, and that the whole administration of the law will be thus thrown into anarchy and disrepute.

The critics seldom stop to ascertain wherein a technicality really exists, and what rules of procedure are necessary and what are not. To many the rules against hearsay evidence and mere opinion evidence are the merest absurdities, yet if they had been present in the courtroom during the notorious Dreyfus trial in France, where no such rules existed or were applied, they would perhaps have wavered in their belief. There the defendant was convicted not because he was guilty but because he was unpopular; there, to impress that unpopularity upon the members of the court, witness after witness was introduced and allowed to testify who knew absolutely nothing about the facts of the case. Noble generals appeared who could only furnish the information that they believed that the defendant was a scoundrel (and this merely because he was a Jew and had been

arrested) and that they as fervently believed that France should live. The defendant in short was convicted not because the evidence showed that he was guilty, but because the array of hostile witnesses made it apparent to the court that a conviction would be popular. In America none of this evidence would have been admissible, and we believe that Dreyfus would not have been convicted.

A distinction indeed should be made between the rules of the law which are necessary in order that courts of justice may exist, that orderly trials may be had, and that the parties may have an abundant opportunity to present their cases and defenses, and the slight technicalities to which the judges of to-day are giving less and less attention. There are certain rules of the game which must be observed, even though at times they may seem unimportant, otherwise there would be no order, and courts of law would not be different from lynching tribunals. It is immaterial whether the rules of baseball allow twelve men to play on each side or nine, whether nine innings shall be allowed or three, but, nine innings having been determined upon, surely all teams should be treated alike and in every game of a series nine innings should be allowed. An arbitrary ruling

in the middle of a game, that there should be only five innings or that three out of the nine men on each side must retire to the benches, would hardly be looked upon as an evidence of fair play. And so it is with the administration of the law; the rules of the game must be so formulated and must be so generally enforced that they can be generally known and relied upon. There must be no claim of unfairness and all men must feel that they are treated alike. Nine out of ten of the so-called technicalities are not technicalities at all but rules which have been adopted after years of experience and trial and which have seemed best for the maintenance of fair play and of justice among men.

It is asserted that justice is ever present; that it knows no *stare decisis* or fixed rules of law, no precedent, no *res adjudicata,* no established law; that every case must be decided on its merits; that written opinions are but a waste of printer's ink; that syllabi but encumber the record. It is argued that whenever it is made to appear to a beneficent judge that a mistrial has been had, a new trial may be ordered by the supreme court, and this even after the lapse of many years, for, if justice has not been done, why then, justice must prevail! Why follow the precedents and

the rulings of the corrupt judges of the past (and to the reformers all of the judges of the past had been tools of the corporations and fundamentally corrupt) when God has given to the present moment unlimited wisdom?[3]

How catching, how plausible, is this doctrine! Irresistible, in these days of primary elections, is the candidate for the bench who will subscribe thereto! Already, indeed such men have carried with them the electorates of sovereign states. But if no case is ever settled or finally decided, what security is there to life or property? If an action to quiet title to one's farm or one's cottage is brought to-day, but ten years afterwards, it being made to appear (in or off the record) to some beneficent judicial despot that the lawyer who tried the case talked too much or that the case could have been better tried, a new action may be ordered; if we are to have a judicial despotism and not a government by law; if, indeed, there is no such thing as an established title and no such thing as a conclusive judgment; if justice, as personally and judicially seen, is the only element; what will become of property rights? Litigation, it is true, and lawyers will

[3] The so-called Non-Partisan League judges of North Dakota were elected on this platform.

flourish; the judicial despot may exude sophistries; and the governmental theorists and the *sans culottes* will applaud; but what of industry, what of property, what of prosperity, what of liberty?

If, as the yellow journals and the self-styled friends of the people assert, there are to be no precedents, and the decisions of the past are not only to have no binding effect, but even no persuasive force or effect, how shall business be conducted, and how shall lawyers advise their clients? The good lawyer, indeed, will not be he who knows the law, but he who is intimate enough to play chess with the judge, or who will hurry to the seat of government in advance of the litigation and ask the judicial despot how he will decide the case. In the past we had government and life and liberty and property at the whim and caprice of insane kings, now are we to have a government by equally insane judicial despots? Is there to be no law merchant, no established rules of public or of private conduct? Is the soundness of a lawyer's advice to depend upon whether or not he is "in tune with the Infinite" and whether his wireless apparatus can catch the vibrations of the infinite mind and the wisdom of an infallible judge?

CHAPTER X

MORE NEEDED REFORMS

MUCH remains to be done in the field of business administration of the courts and of procedural reform, and there is every probability that much will soon be done.

Already power has been given to the justices of the Supreme Court of the United States to formulate their own rules of procedure in the courts of equity, and this reform has already done much to simplify and to render uniform the procedure in these courts. There is also every reason to believe that the same power will be given to establish rules in common-law cases. Similar measures should be adopted in all of the states of the Union. In every legislature and in every congress there are men with undigested ideas of procedural reform, and many men with axes to grind, who seek to change the rules of procedure and of practice. This they do regardless of the statutes which have gone before and of

the general policy of the codes. The consequence has been an inextricable confusion which has tied the hands of the judges and of the practicing lawyers who really desire speed and simplicity.

The next reform is the bringing of business methods into the administration of our courts, and already much has been done in this direction. In the past there has been over-employment and under-employment. The trial judges have been elected or appointed for certain districts and with limited jurisdictions. In some of these districts the litigation has been far in excess of the judicial capacity; in others the judges have had but little to do. The modern desire and the modern tendency, which has been more or less incorporated into the laws of several of our states and which is now being urged before the federal Congress, as far as the United States courts are concerned, is to give to the various chief-justices a supervisory power over all of the courts and over all of the districts, and the power to assign to the overburdened districts those judges who have little or nothing to do at home. Bills also have been introduced in Congress which provide for the appointment of eighteen additional United States district judges who shall be judges at large and who can be used in any of the districts of the

United States. There is also a provision for an increase in the number of federal judges in the metropolitan centers where litigation is increasing with such rapid bounds.[1]

Much also should be done in the direction of cutting off unnecessary appeals. This, however, can only be satisfactorily accomplished if we insist that the trial judges shall be competent lawyers and men on whose judgments the public and the bar will be willing to rely. As long as we have justices of the peace, who, under the fee system are paid in proportion to the litigation which is brought before them, and county judges with large jurisdictions who by the statutes of most of the states are not even required to be members of the bar,—as long, indeed, as we allow incompetency in the trial courts,—so long will the public and the bar insist on the right of appeal. When, however, we provide competency, the desire for the appeal will largely be done away with. It has been held that there is no constitutional right to the relief. The privilege should only be granted where new questions of law are involved and in matters of great impor-

[1] An increase of nearly 32,000 cases has grown out of the various liquor and narcotic laws, the financial stringency which has followed the war, and the general increase in bankruptcy.

tance. It is in the right to the appeal that the great cost of the law arises. It is this right which necessitates the voluminous records and the great expenses of stenographers, typists, and printers. Where the right exists, litigants will make use of it, since the tendency to fight to the last ditch is common to all of us. If the right were taken away, there would be but little complaint.

Among other evils which need to be remedied is the evil of expert testimony. A cynic once remarked that all liars were divided into three classes—liars, damned liars and expert witnesses —and there was much truth in the suggestion. The paid expert is usually a paid advocate rather than a witness. He is employed because it is thought that he will testify for his client, and not infrequently, when first employed, he asks what is expected of him and, when upon the stand, testifies according to the expectation. The examination of such witnesses and the involved and lengthy hypothetical questions which are made necessary, unduly lengthen every trial, and, if an appeal be taken, add largely to the cost of transcribing and printing the record. Added to these objections is the well-known fact that the juries, as a rule, do not understand the technical expres-

sions which are used and pay but little attention to the testimony which is given.

The remedy is clear, and an example is furnished by the procedure in courts-martial. There, where questions of expert knowledge are involved, the president of the court chooses his own experts and authorizes them to investigate and report, and the report when made is conclusive upon all of the parties concerned.

Among the important and significant movements of to-day has been the creation of more or less arbitrary tribunals of arbitration and conciliation in the various trade organizations. These tribunals have been the result of the business man's despair of the courts of law on account not only of the delay and the cost of litigation therein but of the ignorance and prejudices of juries and often, in technical matters, of the judges themselves.

These tribunals are doing much useful service and have come to stay. They are in fact an adoption in business affairs of the old English theory that the juries should be informed rather than uninformed and that they should themselves have the right to inquire and to learn. They are a return to the idea of a jury of witnesses and a jury of investigation rather than a jury which

shall only be a trier of the facts which are produced before it. They create tribunals which, knowing and being supposed to know the laws and the rules of the trade or profession, can administer them of themselves and of their knowledge and not be subject to the instructions of a trial judge who will only administer the law which the public at large has sanctioned and recognized. Arbitration tribunals, however, can have only a limited function to perform. They can have no criminal jurisdiction. Unless they file their decrees in the regular courts and have them there transformed into regular judgments, they have no power of enforcing them except by ostracizing the recalcitrant litigants. They have no power to lay down general rules of law which the public as a whole is bound to recognize. If they appeal to the courts to enforce their decrees, then they must yield to the policy of the general law, for these courts will never sanction a judgment which is opposed to that policy. Though, for instance, the members of the boards of trade may agree among themselves never to plead the defense of a gambling contract and may sedulously refrain from doing so before their own boards of arbitration, the courts, when called upon to put the awards of the arbitrators into effect and to in-

corporate them into enforceable judgments, will be compelled of their own motion to raise the question and to refuse their sanction.

The whole justification for giving judicial sanction to these informal decrees is that they have been agreed to by the parties and that an agreement of submission to arbitrators is itself a matter of contract. It is clear, however, that one may not contract to do an unlawful thing nor to recognize a public policy which the community as a whole does not approve. Therefore though private courts will serve a very useful purpose and will tend greatly to speed litigation, the large cases, the constitutional questions, the criminal jurisdiction, and the determination of our general legal and governmental policies, must still belong to the regular tribunals and be under the established and uniform law.

Much as these new tribunals of conciliation and of arbitration, and even our newly created poor-man's and small-claims courts may be needed, serious dangers are involved in their creation. They are informal and they are presumed to be informal. Being informal they are often arbitrary. They represent and enforce the justice of the beneficent despot rather than that of the established law. Often for the sake of present

justice in the individual case they disregard that established law. Not only do they often deprive litigants of basic rights, but, being informal and being arbitrary, their rules are not uniform or consistent. Often there is one rule for Smith and another for Jones. The result can only be a general confusion in the minds of business men and in the minds of the public generally as to what the real law is and as to what the duties and the obligations of citizens really are. These tribunals no doubt are necessary, but we wish that the necessity did not exist. It would not exist if the public would properly man the courts and the tribunals which it has already created. The fact is that only in the metropolitan centers are the trial courts overcrowded and that only in rare instances are those in the country districts or in the small towns behind their calendars.

Much time and delay and much saving of stenographers' and printers' bills could be accomplished and the ends of justice could be much better subserved if our judges were allowed a greater and more determinative share in the conduct of jury trials. The tendency of to-day, however, is in the opposite direction, and statutes are constantly being passed which more and more limit the powers of the trial judges.

In England, as in America, the right to a trial by jury has been jealously guarded; and there, as in America, the jury has been given the ultimate power to determine the facts in both civil and in criminal cases, and the practical determination of questions of law in criminal prosecutions. In England, however, the presiding judge is permitted to comment freely upon and to express his opinion concerning the weight and the sufficiency of the evidence, while in America this power, though recognized in the federal courts, has been denied, either by direct statutory enactment or by judicial decision, in at least two thirds of the states,[2] and in some the judge has even been advised "to remember the practice of the oyster

[2] The Constitution of 1796 of Tennessee provides: "The judges of the superior and inferior courts shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

An Act of the Legislature of North Carolina which was passed in 1797, provides: "No judge, in giving a charge to a petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury."

These were the original enactments and for some time they stood alone. They were probably due to the remembrance of the excesses of royal appointed judges and were perhaps not an unnatural result of the American Revolution. Beginning with 1850 and down to the present time however, there have been a long series of similar enactments and even in the states where there have been elective judiciaries. See "The Ineffi-

and to be dumb." In many states we have made our trial judges mere umpires and keepers of the peace, when it must be apparent to all that they will often be able to aid the jury greatly in the determination of their cases, and that the benefits that can be derived from their superior knowledge and training cannot profitably be ignored. This denial can only be due to a distrust of government and of the judiciary which does not exist in England or in any of the British dominions, and which does not speak well of our selective methods. In these latter days the distrust has been augmented by the fact that by subjecting our

ciency of the Jury" by Edson R. Sutherland, *Michigan Law Review* 302.

Our jury system in criminal cases, indeed, has consciously or unconsciously, perhaps, inevitably assumed the Roman form, where as a matter of fact not merely the power to correct and to punish but the power to pardon was freely exercised.

"The Roman courts," says Mr. Weeks in his work on attorneys, page 73, "being a mixture of a court and a jury, great latitude was allowed to the advocates, who made every variety of appeal to passion, prejudice, friendship, and enmity; appeals, whether frequent or otherwise, totally out of place in any modern court when addressed to the judges. The Roman courts were not tribunals whose object was simply to discover whether a person was guilty or not, and whether a higher power might step in and exercise a pardoning or mitigating function. The judges in Rome had stepped into the places of the people who formerly judged in the popular courts, and they pronounced their sentence in the capacity of sovereign. The pardoning power, therefore, manifested itself in the courts. Hence it was that, under the influence of pity or compassion, an accused was often acquitted, totally irrespective of his guilt or innocence."

judges to so many and so frequent elections we have taken from them much of their prestige. We have done all in our power to deprive them of their independence and to make them play at politics. It is difficult for a lawyer to respect a judge who in the past has asked for his support on election day, and it is asking much of a judge to reprimand or otherwise to curb the zeal of a lawyer on whose good graces his reëlection may depend. The quite general efficiency and the almost universal probity of the American judiciary under these adverse circumstances, is something of which the American lawyer may well be proud and is a remarkable illustration of our national integrity; but we are playing with fire, and both in these matters and in the clamor for the judicial primary election and the judicial recall our impatient and distrustful democracy is working against its own best interests.

After all our judges and jurors are men and not demigods, and we should not expect the impossible. The administration of the law can never be entirely satisfactory nor can it meet all of our social demands. The jury trial, with all its defects, has taken the place of the armed conflict and the resort to violence. It has been a great popular university and has done much to perpetu-

ate democracy, and to train our people in the art of self-government. At every session of our courts we summon men from the remote corners of our commonwealths to sit in judgment on their fellows and to take a part in the administration of the law, and by so doing we make them loyal to that law. Our judge-made law is often unsatisfactory and is often unscientifically developed and expressed, but it is our own. It has not been superimposed. It is not the product of a cloister or of a star-chamber; it is not even the product of the schools; but it is the expression of our own civilization. Law indeed is applied civilization, applied political economy and applied social ethics; and in their decisions and in the judge-made law which they have announced, the American and the English courts have sought to express and to crystallize, not the ideas or the desires of the few, but the thoughts and the customs of an evolving and growing democracy. They have often erred, but they have seldom lacked in democracy and in humanity, and seldom have they been corrupt. They have erred because they have been human and have been subject to the limitations of the finite mind. That "true law" [3] of

[3] "True law is right reason comformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and

which Cicero spoke never yet has been and perhaps never will be expressed by the edicts of man; never yet has it been universally obeyed. It expresses a rule of conscience rather than a rule of action which can be defined, promulgated, and enforced. It is Christianity itself, but Christianity has aptly been described as "that system or philosophy which induces one to perform voluntarily that which the law cannot compel." It is "right reason comformable to nature," but what is right reason and who is to apply the test? It is the universal law, but that law has not yet been promulgated.

whose prohibitions restrain us from evil. Whether it enjoins or prohibits, the good respect its injunctions and the wicked treat them with indifference. This law can not be contradicted by any other law, and is not liable to derogation or abrogation. Neither the Senate nor the People can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. It is not one in Rome and another at Athens—one thing today and another tomorrow, but in all times and nations this universal law must forever reign eternal and imperishable. It is the sovereign master and moderator of all beings. All men is its author, its promulgator, its enforcer; and he who does not obey it flies from himself and does violence to the very nature of man, and by so doing he will endure the severest penalties, even if he avoid the other evils which are usually accounted punishment."

CHAPTER XI

THE REIGN OF LAW

MANY of our reformers, and many of our sociologists and political science teachers and writers, are as insanely bolshevistic as are the dynamiters of Russia itself. They are not crude enough to use the bomb, but they are steadily undermining all our faith, all of our comradeship, and all of our stability. They rush madly forward and are everywhere seeking direct action. They have no realization of the fact that the universe was built in order and that even the stars of the firmament march in time. They have no conception of the value and necessity of

> A land of settled government
> A land of old and just renown,
> Where freedom slowly broadens down
> From precedent to precedent.

They hunger for something that is new, and to them everything is new. They appear to be of the opinion that civilization was born yesterday

morning at ten o'clock. They fail to realize that back of our institutions, that back of all the liberty that we now enjoy, is the history of many centuries and of many lands, and that in most of the clauses of our constitutions and in many of the rules of our common law are the blood of the martyrs, and the battle fields of the world.

The Goss printing machine which prints and cuts and folds thousands of papers in a single hour is a marvelous mechanical achievement, but it is something more than a machine. In it is contained and from it can be learned the story of civilization. The whole history of writing and of printing is in its keys. Back of it is the time when men scratched characters upon the bark of trees and traced them upon the tusks of animals; back of it is the invention of letters; back of it are the scroll and the papyrus; back of it are the wooden press and the machine that was worked by hand; back of it are the heroism and self-sacrifice of thousands of inventors, who, one after another, added their little to the even now not perfected device. In this machine are the records of broken ambitions and of broken lives and back of it is the struggle of the race. So it is with our American democracy, our American government and our American law. They are not the work of

a single day. In our institutions and in our laws are the struggles and the ideals and the traditions of millions of men. Back of them are the experience, the suffering, and the heroism of the ages.

We must progress. There is no room for the standpatter in a universe of moving atoms and of evolving and revolving spheres. But we must have a thoughtful democracy and not a thoughtless democracy. We must have a government of law and an evolution under the law, and not a government of temporary impulses, and by the passions and prejudices of temporary majorities of excited and often ignorant men.

Without the theory of the supremacy of our constitutions and of the duty of the courts to bow to the established law, our judges would be despots. When they pass upon the constitutionality of statutes and when they refuse to enforce those which violate our basic charters, they are not autocratic or undemocratic but they are doing their best to be democratic. Having been voted upon and adopted by the people as a whole, our constitutions are the most democratic of all our legal documents.

If our judges knew no control and there were no limits to the expression of the temporary enthusiasm and the selfish desires of the temporary

majority, we would have a government by force and passion and not a government by reason and by law. Our constitutional safeguards were not enacted in order that democracy might be enthralled but in order that democracy might have time in which to think. Our courts, as far as possible, follow the precedents of the past, not because they delight in refinement and in technicalities, but, because they desire as far as possible to maintain a uniform, impartial, and understandable law.

It is time for the American people to stop and ask themselves what they really expect of their judges and what they really want. In a nation as large as ours, and in states as large as ours, government can only be representative, and the idea of a pure democracy is impossible of practical fulfillment. Though the popular desires will ultimately control and will ultimately be reflected in our important and stable national policies, we must, in temporary policies at any rate, and in the gradual upbuilding of our law and of our civilization, choose between a supreme court which shall have the opportunity of a sober second thought and the ability to reflect the sober second thought of the people themselves, and a government by bureaus or legislative committees, who as

a rule will reflect that which is transitory and who will always be more or less class-influenced.

We demand centralization more and more, and yet centralization must inevitably lead either to bureaucracy or to court control. As the problem of existence grows more and more difficult with the increase and concentration of our population, as the industrial conflict grows keener and keener, men will more and more rush to the legislatures for help. The more this is done, the more and more will it devolve upon the courts, or, in their absence, upon the legislative bureaus or committees, to decide how far government shall go, and how far not. Some one man or some body of men must set the limits and the boundaries of the ever-present struggle between individualism and collectivism; between the right, or the supposed right, of the individual to do as he pleases, and the right of the public to protect itself. Some bureau or court or committee, must, as the occasion arises, draw the boundaries between the doctrine of individualism and the doctrine that the public welfare is the highest law, and must determine in what the public welfare really consists.

Already there are over fifty standing committees of Congress. Already Washington is the lobby

camp of the world. It is only when a bill is of great political import or peculiarly sensational that there is a full consideration by Congress. To question the wisdom and the report of a committee is *lèse majesté*. This is necessarily so, for any other method of procedure would demand a continuous session of our national legislature.

Judicial supervision of our great governmental policies perhaps was first advocated and adopted because Hamilton and Washington and Adams and Marshall distrusted the people and desired to establish a firm central control. For a time perhaps it was acquiesced in and was extended to social and intra-state as well as interstate and national matters because the powers behind the throne—the great conservative and commercial interests—saw it in the bulwarks against collectivism. In the future it will, we believe, be maintained because no other bureau or committee will in the long run be found more responsive to the popular wishes and the sober second thought of the American people, and because the magnitude of the governmental work which has to be done will make some bureaus, or committees, or public policy determining courts, absolutely necessary.

At the time of the American Revolution, Burke was asked, "What of the future of American Democracy?" He answered, "Wait until the twentieth century, that will decide." In 1850 the great Frenchman, De Tocqueville, though an aristocrat by birth, and not believing in the popular movements of his time, stated that in his mind democracy was irresistible. De Tocqueville, however, by no means believed that democracies could endure, and as far as America was concerned, he not only prophesied a race war between the blacks and the whites, but expressed the opinion that, on account of the divergent races, sects, and religions to be found among us and the lack of a common history and a common tradition, we could never maintain a great foreign war, and that a draft would be impossible. Burke seemingly placed his doubt upon the matter of subsistence, and realized that the test would come when the continent had been occupied and all of the vacant lands had been settled or had been given away. Both seemed to realize that the form of government is merely an incident, that as far as forms go the wheels of progress or of change (and sometimes change is not progress) rarely go backwards, but that the form of government is not everything.

Under the color of freedom, indeed, anarchy and discord may prevail, and we have but to look to Mexico and to the so-called republics of South America to realize that merely calling a government republican does not necessarily make it either democratic or humane. We have only to look at England and Canada to learn that, provided the idea of a government of laws and not of men prevails, and the principles of the common law and of Magna Charta are recognized, there can be freedom and democracy even under a kingly leadership. We have but to look to Russia to learn that the evils of the rule of an enthusiastic but visionary and unbridled mob may be as great and as disastrous in their consequence as those of the cruelest of personal despotisms.

The frontier has now been absorbed and the era of collectivism is now upon us. We are no longer a frontier people. Our states are themselves becoming empires in population and importance. Their interests are more or less conflicting. Controversies such as that which but recently arose between the states of Kansas and Colorado over the exhaustion for purposes of irrigation in the latter of the waters of the Platte and the Arkansas and the Laramie rivers, which was peacefully settled by the Supreme Court of

the United States, would, in South America, have resulted in war.

Not only will the courts of the future be potent factors in the controversies of the states, but from now on, the aid of the law will be more and more invoked within the states themselves, and individual conduct and freedom will come to be more and more regulated by law. One isolated in the wilderness may do largely as he pleases, as there his conduct affects no one else; but he who lives in a crowded community and among his fellows, must "so use his own as not to injure the rights of others" and of the community as a whole of which he and those others are units and parts.

The history of the growth of the English and American law has been the history of the struggle between the adverse principles of individualism and collectivism; and all sane government would seem to consist in a wise compromise between these two extremes. We advocate individualism because it as a rule is the wiser social doctrine, because it produces courage, independence, thrift and the more manly virtues. But the time has now come when the rights of the individual must be more and more subordinated to the idea of a loyalty and a duty to a common country, a common humanity, and a common cause. Where the

compromise is to be, is for the courts or for some other tribunals or bureaus to determine. As the problem of existence grows more and more complex and the industrial struggle grows keener and keener, men will look more and more upon the government as a partner and as a protector, and will rush to the legislature for help. As wealth concentrates in the hands of the few, as the discontented classes grow larger and larger (and where there is democracy there is always discontent), our courts, or some other persons or bodies, will always be called upon to pass upon the reasonableness of statutes, to define the boundaries of individualism and of collectivism, to define personal as opposed to social rights, and to draw the line between state and national sovereignty. Someone, in short, must interpret our constitutions and our basic law and must decide how far governmental control can and shall go; and that some one must be either a trained but aristocratic body like the English House of Lords, an autocratic and unrepublican, though able and scientific body like the German Reichstag, an organized bureaucracy like that of France, an American congressional or legislative committee, or an American court.

We must face conditions as they are. We must

protest less and construct more. Above all we must seek to understand before we criticize. We must face our constitutions and the constitutional constructions of our courts and either accept or change them. We can change if we will, and we can take the power of constitutional supervision entirely from our courts, but we should think long and seriously before we advocate the change. In the meantime, at any rate, if we do not desire the change, we should not criticize our judges for the exercise of a jurisdiction in which we have for so long acquiesced.

It is not fair to the courts, and it is not good for an ordered democracy that we should continue to do what we are now doing, and that is to ask our judges to lift up their right hands and swear to support the constitutions, and then, if they do support the constitutions, to pillory them in the public press and to refuse them reëlection because they have declined to prostitute their intellects and to violate their oaths of office.

The era of pure democracy is upon us with all of its difficulties and dangers, and with all of its magnificent possibilities. The wheels of revolution seldom go backwards, and new rights and liberties are seldom surrendered. This democracy must be made intelligent or anarchy will prevail.

Its dangers are ignorance and selfishness. There is the danger that the selfishness and ambition of the politician may feed on the ignorance and selfishness of the voter.

The ambition of the self-seeking politician and of the predatory rich man is no different from that of the warrior chief of the middle and of the earlier ages; and there is no difference between the tyranny of one who is backed by millions of vested wealth and of one who is supported by the votes of a misinformed and prejudiced electorate. The warrior chief fought for and sought to establish principalities because he wanted power and desired to be envied by his fellow men. Europe was deluged with blood for many centuries because petty chiefs were jealous of each other and wanted power. There are men to-day who would debauch free government and democracy itself in order that they may have power and that their theories may prevail.

We must reform and we must progress, but we must not have anarchy. We must not destroy the whole edifice of government because the building is in need of repair. The ultimate control is the judiciary, but the judiciary in most of our states is subject to the terrors of the primary elections, and by being compelled to seek votes is daily losing

its prestige, its power, and above all its own self-respect.

The march of events and of industrial evolution has been more rapid than has been the growth of sane and constructive statutory law, and the common law of the past is coming more and more to be looked upon by the public as arbitrary and its reasoning obsolete. The courts are blamed for all its defects. If they change it, they are charged by the defeated litigant with judicial legislation. If they enforce it in its entirety, they are charged with a love of technicality and a lack of democracy. The public is moved by a fervor of reform but knows not what it seeks. The problem of government is the most difficult of all problems. It is the most difficult because in its solution there is involved man's mastery over himself.

The battle for self-government has been fought and won, the arbitrary rule of kings is a thing of the past. Religious liberty is now taken as a matter of course. In a measure we have solved the problem of production and, in spite of the warnings of the pessimists, we have still reason to believe that the earth, if only properly tilled and if only furnished with adequate means of transportation, will for a long time to come be sufficient for the needs of all of its inhabitants. Fifty years

ago it would take a woman a week to knit a pair of stockings; now she can sit down at a machine and turn out dozens in a single day. The steam-shovel can remove mountains and the twine-binder can make possible the harvests of semi-arid and unpeopled plains. We have harnessed the air and the water to our chariots. We can cross the ocean in a few days. Wherever there is a new industrial need, the inventors can be relied upon to furnish the solution.

The one unsolved problem is the problem of government, and back of that problem is the problem of human comradeship. In order that there may be comradeship there must be a government of laws and not of impassioned men. In order that there may be a government of laws there must be an understanding of its scope and of its limitations. We must seek to understand the problem of the courts. We must make our judges universally respected. We must make it possible for them to respect themselves.

At the least, we can be fair. Criticize as we may, and as a free people should, the individual decisions of our courts, the costs and delays of judicial procedure and the frequent incoherency of the law, we can at least do homage to the ability and lofty patriotism of the American

judiciary. Every thoughtful man must bow before the social and intellectual monument that is theirs. He cannot but be impressed, not only with the general probity of the American judge, but with his statesmanship and his wisdom. It is no easy thing to steer the ship of state and to guide the social advance of a great nation. It is no easy thing to interpret the social ethics of a free people.

In our cosmopolitan America are the representatives of every nation, of every class, of every religion and of every tongue. We are not a nation, but a nation of nations. Classes and nationalities and religious sects which in Europe through the centuries have been at war, and through the centuries have been divided, have here worked out a common destiny and have builded a great cosmopolitan civilization. They have done this under a democratic government of laws and not of men. They have done this because they have yielded obedience to a common and a democratic law. The fact that our heterogeneous peoples have in the past yielded such an implicit obedience to the mandates of the American courts, is in itself the highest monument to the wisdom and to the probity of the American judge. The mandates of our courts have settled boundary lines, they have determined great social and indus-

trial policies, and they have controlled sovereign states. No standing army has been relied upon; the court stenographer and the court marshal have been army enough. The mandates of our courts have been obeyed because our people as a whole have learned the art of self-government and of respect for the law, and because back of those mandates has been the will, the strong right arms, and the bayonets, if necessary, of millions of citizen soldiers. We have obeyed those mandates because in the past the American people have trusted, and in the past have had reason to trust in their judiciary, and have grasped the magnificent concept of the government of a free people made free by law and by law alone.

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